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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

SEPTEMBER 23, 1921—JANUARY 10, 1922

FREDERICK W. ARTHUR

REPORTER

PUBLISHERS
GEO. BANTA PUBLISHING COMPANY
MENASHA, WIS.
1922

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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Attorney General - - WILLIAM J. MORGAN
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MEMORANDUM.

Mr. Chief Justice SIEBECKER took no part in the decision of the cases reported in this volume on pages 443–543 and 613–637.

ERRATUM.

VOL. 174.

Page 44, ¶ 2 of syllabus, line 4, should read:

that the meeting in fact was held on April 3d, since the

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IN MEMORIAM.

JOSHUA ERIC DODGE.

On the 20th day of September, 1921, Mr. Samuel M. Field of Milwaukee presented the following

Memorial of the Milwaukee County Bar Association.

May it please the Court:—The committee appointed by the Milwaukee County Bar Association herewith presents for record in this court the following brief memorial of the life and services of the late Justice JOSHUA ERIC DODGE:

JOSHUA ERIC DODGE was born at West Cambridge, now Arlington, in Middlesex county, Massachusetts, on the 25th day of October, 1854. His parents were splendid representatives of the best colonial stock of New England.

Judge DODGE gained his early education in the schools of his native state, and later entered Iowa College at Grinnell, Iowa, where he was graduated with his class of 1875.

He prepared for his chosen profession in the law department of Boston University, receiving his degree with the class of 1877.

He was admitted to the bar by the Supreme Court of Massachusetts, in which state he practiced for one year and whence he came in 1878 to Racine, Wisconsin, where he continued in general practice for fifteen years, and where he was associated for several years with John T. Fish under the firm name of Fish & Dodge.

His career at Racine was eminently successful, and he gained the reputation of being one of the strongest, ablest, and most forceful members of the Wisconsin bar.

His reputation soon traveled beyond the limits of his home city and state, and in 1893 he was appointed Assistant Attorney General for the United States, a position which he retained until 1897, his appointment and service being during the administration of President Cleveland.

Upon completing his service at Washington Judge DODGE returned to Wisconsin and established his home in Milwaukee, where he engaged in the general practice of law until 1898, at which time he was appointed an Associate Justice of the Supreme Court of the state, a position which he retained for approximately twelve years.

Upon retiring from the bench Judge DODGE again entered private practice, but limited his work to that of special counsel.

Joshua Eric Dodge.

Although Judge DODGE was the recipient of many public honors, it was as Justice of the Wisconsin Supreme Court that he achieved his greatest distinction and reputation.

His mind was alert and acted quickly. He was possessed of a remarkable ability to analyze a given situation. He had the power of clothing his thoughts in such fluent, lucid, and delightful English as to make his decisions models of clarity.

It fell to his lot to write the opinions in some of the most important decisions handed down by our Supreme Court, and his clear reasoning and literary eloquence did much to make the Supreme Court of Wisconsin respected and illustrious throughout the nation.

There are few lawyers who practiced before the Supreme Court during Judge DODGE's service that will not remember and readily testify to his wonderful ability to seize upon the weak or strong point in a case that was being presented, as evidenced by the keen analytical questions which often disclosed a fallacy or established the soundness of a proposition; questions prompted by an earnest desire to judicially analyze and assist.

Justice DODGE's work on the Supreme Bench was thus characterized by the late Mr. Chief Justice LYON: "His industry and learning in the law, his culture and breadth of intellect, his integrity and character and judicial temperament entitle him to personal and public confidence."

As a man, Judge DODGE was simple in his tastes, and his wants and needs were few and easily satisfied. He was a plain man, quiet, retiring but yet approachable; a man of few friends, but to them loyal and ever devoted.

In his later years he was a lonely man, seeking the companionship of few.

He was a great counselor and his advice was ever sound, sensible, and safe; a natural lawyer; a man of strong first impressions, which were seldom changed by subsequent study or consideration.

He was possessed of a high sense of equity and a keen discrimination between right and wrong. He was always eager to assist in rectifying an injury or to assist a friend in need or trouble. He was a great teacher, patient, and always willing to explain his viewpoint and conclusions to the young lawyer who might seek his counsel.

He was a gentleman of the old school; in social matters polite, considerate, and punctilious.

All in all, he was a great lawyer; an able and worthy public servant; a true, valued, and mourned friend.

WILLIAM C. QUARLES.
FRANK M. HOYT.
WILLIAM H. BENNETT.
SAMUEL M. FIELD.
E. H. BOTTUM.

On behalf of the court Mr. Justice JONES responded as follows:

The opinions of Mr. Justice DODGE are found in forty-three volumes of the Reports of this court. These opinions are the fittest eulogy upon his life and character and a lasting memorial of his service to the state.

The twelve years of his service on the bench included the beginning of a period of important and sweeping changes in our statutory law. Perhaps the most important constitutional questions which came before the court during that time grew out of the statutes imposing *ad valorem* taxes on the railroads, and inheritance taxes.

He brought to the court a training admirably fitted for the work. He had served an apprenticeship in the general practice of the law in a community where he had worked in competition with very able lawyers and had tried and argued cases before eminent judges. There had been time for the exhaustive study of his cases. He had confined himself to no specialty. By untiring industry he had acquired a profound knowledge of the common law. There can hardly be a more stable foundation for distinction in the ranks of the profession or on the bench than such a training affords.

But he had additional training. By his work in the state legislature and with committees he had acquired a practical knowledge of legislation, of the workings of the state government and its several departments, and of the construction of statutes. As Assistant Attorney General of the United States he had gained familiarity with the federal statutes and the workings of the governmental departments and bureaus at Washington.

In that field of labor he had studied the distribution of powers between the state and federal government and had become thoroughly qualified to consider the constitutional problems which were constantly brought before the court. He brought to the examination of the complicated financial transactions which frequently came before the court a clear knowledge of business. His opinions show that he had a righteous scorn of fraud in matters of business and a keen appreciation for the sanctity of trust relations in the affairs of life. It would be hard to find in legal literature clearer and abler expositions of the police power of the state than in several of his opinions, and they illustrate his mastery of the principles of constitutional law.

With his thorough knowledge of the law, his logical mind carried him quickly to the heart of the issues before him, and in classic English, without undue elaboration, and yet with adequate statement of his reasons and the authorities, he prepared opinions which adorn our legal literature and enrich our jurisprudence. As we read them we find no repetition, no contradictions, no ambiguities.

They are clear as crystal and afford evidence not only of his mastery of the law and facts involved but also that he had been a student and lover of the English classics.

When as lawyers we argued cases before him we were often surprised that he grasped so quickly the crucial points in voluminous and complicated records. His keen, logical, judicial mind had little patience with arguments on extraneous or irrelevant matters. At times when such arguments were presented or a bald fallacy was argued, a critical remark would escape him; but those who knew him well understood that such utterances were purely impersonal. They were the spontaneous utterances of a logical mind, and quite as likely to be addressed to lawyers whom he had known intimately in former years as to young practitioners.

Before coming to the bench Mr. Justice DODGE, like Chief Justices MARSHALL and CHASE, Mr. Justice HARLAN, and other distinguished jurists, had been a partisan in politics. He believed in government by party and had taken an active part in the councils of his party and in directing its policies. But he fully realized that on entering judicial life these activities must cease. It was then his only ambition to further the administration of justice. He realized that he was the representative of no party or class, but a trustee for the whole people, and that it was his supreme duty to judge "righteously between every man and his brother and the stranger that is with him."

By nature and association Mr. Justice DODGE was a conservative. He believed in written constitutions and that the guaranties to property rights and individual liberty which they promised should be enforced. But like Chief Justice WINSLOW, whom he loved as a brother, he also believed that those guaranties should not be so narrowed by construction as to ignore the rapid and vital changes which were taking place in the social and industrial life of the generation in which he lived.

GERRY WHITING HAZELTON.

Mr. K. K. Kennan of Milwaukee presented the following

Memorial of the Milwaukee County Bar Association.

May it please the Court:—The subject of this brief memorial—GERRY WHITING HAZELTON—came from that part of these United States which was devoted to "raising men."

He was born in Chester, New Hampshire, on the 24th day of February, 1829.

His father, William Hazelton, born in 1789, as well as his mother, Mary Jane Cochrane, were of English extraction and both natives of "The Old Granite State." William's father, John, as well as his

grandfather, Ephraim, were also natives of Chester, but Ephraim's direct male ancestors, Richard, Abraham, and Robert, were of Bradford on the Merrimack in the Colony of Massachusetts Bay.

As a boy GERRY W. HAZELTON had that mental training which was common to his neighboring companions and acquaintances, the ordinary common school with a term or two in Pinkerton Academy, located in Derry, New Hampshire. In 1846 we find him teaching school. In 1848, having gone to Amsterdam, New York, he found an opportunity to enter the office of his uncle, the Hon. Clarke B. Cochrane, where he occupied his time in the study of the law. This was the main turning point in his life, and it was here, after admission to the New York bar in 1852, he met and married Miss Martha L. Squire, the companion and helpmeet in all his joys, sorrows, toil, and successes until her death in Milwaukee at their home on the 20th day of April, 1907.

He remained in Amsterdam following the practice of his profession until the year 1856, when he packed the accumulations of his early labors and turned his face again westward. Why he finally located in Columbus, Wisconsin, we are not apprised, but he did so, reaching there in 1856, immediately opening an office and engaging in his profession. During the time he was preparing himself to take on the duties of a lawyer he was earnestly broadening his learning and mental training by a close and assiduous application to those branches of study of which as a student during his earlier education he was not able, from lack of opportunity and money, to take advantage. It was at this time that he delved into the classics, and that they left their impress upon his mind one only needed to have met and conversed with him to perceive readily that there was a foundation there that made him clear and convincing in his conversation.

In 1860 he was elected to the State Senate, of which he was chosen President *pro tem.*, and re-elected President *pro tem.* at its extra session. Following the death of Governor Harvey he was *ex officio* Lieutenant Governor of the state. He was a delegate to the Chicago convention which first nominated Abraham Lincoln as candidate for President on the Republican ticket. It can be said of him "that he knew Lincoln," for who could have prepared the paper which he wrote on Abraham Lincoln without knowing him? At the meeting before which this paper was first read, the late Mr. Chief Justice WINSLOW, who also was scheduled to deliver an address, was so touched by the eloquent language used that he asked to be allowed not to speak lest he should break the spell. The writer of this imperfect sketch cannot refrain from relating an anecdote which Mr. HAZELTON recounted to him of an interview had with Lincoln in those days of distress and depression:

"When we reached the Presidential mansion and our arrival had

been announced, Mr. Lincoln without delay came out of his then improvised office and without introduction greeted us with a pleasant smile and a shaking of hands, asking us to come into his office. We had come thinking to learn something of his ideas or opinions of the great conflict which was being waged between the North and the South, but no word of it was mentioned; he seemed anxious to know just what was going on in Wisconsin—mentioned the fact of having been in our state—what took him there, and inquired after some of the people that he had met, all with the cordiality that one might expect takes place between old friends who bring messages from the land of mutual acquaintances. He looked weary and sunken-eyed, but nothing of it appeared in his manner. All through the interview he impressed us with the atmosphere of desiring to keep from us anything depressing or gloomy, and when we left him his face wore, over and above the anxious look easily perceivable, that soft, gentle smile that had been present during the whole interview."

To the writer it seemed as if Mr. HAZELTON was trying to share the inspiration of this interview with the whole world, that it was a something too vast, too holy for him to possess alone; it was verily a laying on of hands.

In 1864 he was elected prosecuting attorney for Columbia county, and while holding this office he was appointed collector of internal revenue for the Second district of Wisconsin, from which latter office the "Tennessee Tailor" removed him because he dared criticise the cut of the political clothes which were then being turned out at the executive factory at Washington. Mr. HAZELTON knew the style of apparel that marked the dependable men of his day, and would not consent to wear the livery of an opportunist.

In 1869 he was appointed by President Grant United States district attorney for Wisconsin, serving in this capacity until 1871. He then resigned to become a member of the Forty-second Congress, having been elected at the fall election of 1870 from the Second district, at that time composed of the counties of Columbia, Rock, Dane, and Jefferson.

During his stay in Washington he served as one of the regents of the Smithsonian Institution under appointment by Speaker Blaine, having as associates upon the board Judge Rockwood Hoar of Massachusetts and "Sunset Cox" of New York, a distinction that Mr. HAZELTON prized more highly than any other outside honor conferred upon him.

The re-apportionment following the census of 1870 somewhat changed the Second district, Rock county being eliminated and Sauk county substituted, but Mr. HAZELTON was renominated by acclamation and elected to the Forty-third Congress.

At the close of this his second term in Congress Mr. HAZELTON resumed his law practice, soon after accepting from President Grant the unsolicited appointment of United States district attorney

for the Eastern district of Wisconsin, removed to Milwaukee and entered upon the duties of this office in August, 1875, continuing in that office until 1885.

Mr. HAZELTON first appears in the Milwaukee city directory in 1876, his residence being given as 202 Division street, now known as Juneau avenue, and it can truly be said of him he could not be charged with more than a moderate amount of nomadcy, for it was in this home first chosen by him in Milwaukee that he died. For full twenty-five years he was counsel of the Grand Trunk Railroad and commissioner for both state and federal courts. In 1912, and when he was eighty-four years old, or we might say eighty-four years young—Mr. HAZELTON was never old—he was appointed special master in chancery to close up the affairs of the Allis-Chalmers Company, the responsibility of which position can be estimated from the fact that the claims in this matter aggregated several millions of dollars, involved the settlement of personal injury actions, and included the transfer of the holdings, real and personal, belonging to the corporations making up the company located in Scranton, Chicago, and Milwaukee, and when the reports and accounts of the master were presented to the court for final action they were without exception approved and confirmed.

Mr. HAZELTON was a familiar figure upon our streets in his comings and goings, for to the very last he held his office open following the practice of the law, his counsel and advice being as clear, strong, and convincing as in the days gone by.

He was a faithful member and attendant of Immanuel Presbyterian Church of Milwaukee, filling many of the lay offices connected with this church. He was a biographer of more than common ability, the papers prepared by him on Hamilton, Lincoln, Greeley, and a number of other distinguished men bearing witness to the gift. When he read those papers before the various assemblages for whose hearing they were prepared the eloquence of his reading held his audience to the very end.

Of such stuff was GERRY WHITING HAZELTON made—and so he lived until the 29th day of September, 1920, and then he died, leaving to mourn the loss of his companionship a daughter, his sole surviving near relative.

J. M. W. PRATT.
WILLIAM W. WIGHT.
CHARLES S. CARTER.

Mr. Justice DOERFLER responded:

The death of GERRY W. HAZELTON has removed from our midst a man of the highest type of American citizen, a learned, polished scholar and gentleman, a lawyer of recognized ability and standing at the bar and in the community. He was engaged in public life

long before many men now in their prime were born. Coming to this state in 1856, after having been admitted to the bar in the state of New York in 1852, he continued to practice his profession in this state continuously up to the time of his death, in February, 1920, with the exception of a period of four years, during which he served his district as a representative in Congress.

As a practitioner at the bar his early experiences were not unlike those of most of us in the early period of our career. His clients were neither numerous nor were the matters intrusted to his care of great importance. His industry, devotion to duty, and ability, however, soon became recognized by his constituents, and in 1876, at which time he removed from Columbus to Milwaukee, he had built up a very fair and satisfactory practice. From 1876 until the time of his death he remained a resident of the city of Milwaukee, and during that period was engaged in many important legal controversies.

There is one predominant feature which perhaps stands out very pronouncedly with GERRY W. HAZELTON, from the standpoint of a lawyer, and that is the thorough attention and preparation which he gave to all matters intrusted to him by his clients. He was particular in giving every matter of litigation coming to his attention the closest of study and consideration before advising a lawsuit, and then after having entered into litigation he pursued the same with a righteous zeal and determination to the end. His glory as a lawyer did not consist in the winning of lawsuits, but in the representation of his client at the bar, in the interests of what he considered a righteous cause or defense.

In the many years the members of this court have had personal acquaintanceship with GERRY W. HAZELTON, I believe no one can recall a single instance where he either lost his temper or his mental equanimity. In fact, so just and true was his nature and so fair his conduct towards his fellow brethren at the bar and the members of the judiciary that it is difficult to conceive of any one making an unjust or unfair attack upon him warranting a deviation on his part from the full control that he at all times had over his emotions.

In the many hearings attended by the writer before him as a court commissioner or a master in chancery, he has always been found ready and quick in his decisions, both during the hearing and at the conclusion thereof, and his findings were quite uniformly sustained by the court. He did not practice law for the purpose of amassing a fortune; in fact that is a trait which he had in common with many of the best lawyers in the state. His whole energies seemed to be absorbed in performing his professional duties, and the matter of fees he always considered as a secondary thought, coming as a necessary coincident with the business transacted. His

presentation of a case to the court or jury was always clear, convincing, and persuasive. Few practitioners at the bar have had a finer or more fluent command of the English language, and after Mr. HAZELTON had finished his arguments there was no doubt in the mind of any one who had heard him as to his exact position.

Since arriving in this state in 1856 he was engaged actively in participating in almost every political campaign down to the time of his death. He was a Republican in 1860 when Lincoln was first nominated, and a delegate to that convention, and he was true to his political beliefs at all times. He was a great student of American history, and his biographical sketches were literary gems. No more eloquent address was ever prepared or delivered on Abraham Lincoln than the one delivered by him before the State Bar Association in July, 1915. While a thorough American, he was possessed in a high degree of the spirit of toleration. He had no strong racial, religious, or political prejudices, and he was as much beloved by his political opponents as a citizen as he was by those who were believers in his own doctrines.

It is hard to realize that one who has taken so prominent a part in public life for so many years shall be no longer seen or heard upon the arena. However, he has set a high example for his fellowmen and for his brethren in his beloved profession, and though he may be dead in the common acceptation of the term he will not be forgotten, at least by those of the present generation who have known and loved him.

ALBERT E. THOMPSON.

Mr. Frank C. Stewart of Oshkosh presented the following

Memorial of the Winnebago County Bar Association.

May it please the Court:—The committee appointed by the Winnebago County Bar Association presents to the court the following memorial of the life and services of the late ALBERT E. THOMPSON:

ALBERT E. THOMPSON, a lawyer whose brilliant intellect, shrewd common sense, and devotion to his profession won for him an enviable position at the bar of his native state, is dead. It is therefore most fitting that we should consider for a brief time the life, the attainments, and the character of this gifted and eminently successful man, who for many years filled a prominent place in our state, and whom now we mourn not only for his conspicuous ability but for the friendly comradeship, the simple kindliness of his everyday life.

ALBERT E. THOMPSON, eldest son of John C. and Catherine Cameron Thompson, was born October 28, 1850, while his parents were

visiting at the home of relatives near Princeton, Wisconsin. His grandfather, Rev. Robert Thompson of Glasgow, Scotland, came to America in the early part of the Nineteenth century and settled in New York state, where his son, John C. Thompson, was born in 1825. The pioneer spirit of Mr. THOMPSON's grandfather was a characteristic also of his father, who removed in early manhood to the state of Indiana, where he engaged in business as a merchant, and it was in the town of Valparaiso, in Northern Indiana, that ALBERT E. THOMPSON spent his early boyhood. At the breaking out of the Civil War his father enlisted in Company I of the Eleventh Indiana Infantry, and after being disabled so that he could no longer serve his country as a soldier he removed with his family to Princeton, Wisconsin. In that rural community, before he was fourteen years old, ALBERT THOMPSON organized a military company of boys, of which he was captain, and several of whom enlisted before the war closed. This action of a mere boy, showing patriotism, power of initiative, and prompt action, was an early indication of the character of the man. Even in youth he was no mere dreamer of dreams. He translated every thought into action and made it count in the sum total of worthy human endeavor.

Mr. THOMPSON obtained his academic education in the common schools of Green Lake county and at Ripon College. Although he was not a graduate of that institution he became one of its trustees and received from it an honorary degree. With comparatively few years of schooling he was in a broad sense a highly educated man. His mind was alert, quick to discern the false from the true, and trained by concentration and application to arrive at ultimate truths and sound judgments of men and affairs. He was interested in all things that concerned the betterment of humanity, though devoting himself with rare singleness of purpose to his chosen profession. He traveled widely, both in the United States and in the Old World, storing up in his capacious memory a multitude of impressions that made him an entertaining speaker on public occasions and a delightful companion among his friends.

When still a youth he studied law in the office of Attorney J. M. Fish at Princeton, was admitted to the bar in June, 1871, and began the practice of law before he had attained his majority. His profound knowledge of the law, evident in later years, was not obtained from instruction in the law schools, but from the diligent study and close application which he gave of his own accord to every subject however minute. In a very real sense he was self made, forced to mastery not by any influence from without, but by a compelling energy within, an enthusiasm for work, a remarkable capacity for sustained endeavor—qualities which he himself has often said were bequeathed to him by the sturdy, strong-minded Dutch ancestors on his mother's side. After practicing law for several years in Princeton, where he was also associated with his

father, the editor and proprietor of the Princeton Republic, he removed in 1879 to the city of Oshkosh, where he resided until his death. In 1889 he was appointed by the President of the United States as special district attorney for the Eastern district of Wisconsin, to assist in the defense of important suits against the government arising out of the overflow cases in the Fox River Valley. In 1894 he was appointed by the Governor of Wisconsin as resident Regent of State Normal Schools, and continued to hold that office until 1904, serving for a considerable portion of that period as President of the Board of Regents. He brought to that high office in the cause of education the same qualities that distinguished him as a lawyer—practical common sense, broad vision, keen interest, careful attention to details, and an executive ability that enabled him as business administrator of the affairs of the Oshkosh Normal School to accomplish great results in a direct and quiet way without arousing opposition among his colleagues.

Mr. THOMPSON did not enjoy strife and never courted a conflict, although he stood firmly for the rights of his clients. He was a man of peace, both in his private and his public life, hospitable to the ideas and the opinions of others and full of sympathy for his friends. While he was interested in public affairs and in politics and possessed the qualities that would have made him either a legislator or an executive of a high order, he never sought to hold office, and preferred to play his part in the drama of life as a professional man and not as a politician. That he chose wisely is proved by the remarkable success that he achieved and by the wide and honorable reputation that he enjoyed. He loved his profession, he was devoted to the interests of his clients, and he was respected and admired by his fellow members of the bar. His great ability was the gift of nature; but his thoroughness, his diligence, his conscientiousness, his faithfulness in the discharge of every duty, and the cheerful, courageous spirit with which he met illness and suffering, these are the noble qualities that were his through deliberate cultivation and long practice—the qualities that endeared him to his friends and that make him an example worthy of imitation.

And now he has gone. He died September 5, 1917, answering the summons sure and swift that took him in a day from the cares and activities of life here to the peace and rest of the great hereafter.

FRANK C. STEWART,
JOHN W. HUME,
ARTHUR H. GOSS,
Committee.

Mr. Justice ROSENBERRY responded:

The career of Mr. THOMPSON exemplifies anew the fact so often referred to here that the work of a lawyer, however well or thor-

oughly done, is not, in a superficial view at least, of a permanent character. Mr. THOMPSON occupied for many years a large and important place in the industrial and commercial life of the Fox River Valley. His advice and counsel was sought by many of the men who laid deep and strong the foundations upon which the welfare of that section of the state rests. With his pre-eminent ability in purely legal fields he combined an unusual capacity for business affairs. He made a large contribution to the general welfare of the community which he so ardently and for such a long period of time served. To his guidance and counsel many men and institutions owed their success. The impulses which he gave to the industrial and commercial life of his community will long survive, and in that view his work is of a permanent character. Where he and those of his generation sowed, others will reap. Genial, companionable, and lovable, he was strong, forceful, and persistent. His services to the public, although in a capacity which did not attract wide attention, are worthy of the high commendation paid them in the memorial. His life and services, while not accompanied by pomp and display, have left a permanent impress upon the life of the state. The court heartily concurs in the matters set forth in the memorial, which will be received and placed on file.

CHARLES BARBER.

Mr. Edward J. Dempsey of Oshkosh presented the following

Memorial of the Winnebago County Bar Association.

May it please the Court:—On the morning of March 10, 1915, his fellow-citizens, and especially his brother lawyers, were shocked to learn of the death of CHARLES BARBER, the lawyer. He worked as a lawyer up to bedtime on Tuesday evening and died at one o'clock in the following night. Practically he died in harness, as, we doubt not, he would have chosen to do.

He was born at Burlington, Vermont, on September 12, 1851, of old New England stock. He came to Oshkosh with his father and mother in 1857. He graduated from the Oshkosh high school in 1868. Later he pursued his literary studies with Arthur Everett, principal of the high school. During this time he studied law in the office of Earl P. Finch and acted for a time as assistant principal of the Oshkosh high school. Later he attended Columbia Law School.

In 1874 he commenced the practice of law in Oshkosh in company with Earl O. Finch under the firm name of Finch & Barber. This firm immediately took, and continuously maintained, high rank throughout the state on account of the ability of both members. About 1884 Henry Barber, brother of CHARLES, was admitted into

this firm, which continued until 1888 when Mr. Finch died. Thereafter until the formation of the later firm Mr. BARBER and his brother Henry continued to use the name of Finch & Barber. In 1893 Mr. BARBER and his brother Henry associated with themselves Mr. Fred Beglinger and adopted the firm name of Barbers & Beglinger. This firm maintained the high standing of Finch & Barber. It continued until the election of Mr. Beglinger to the office of county judge in 1911. Thereafter Mr. BARBER and his brother continued the law business under the firm name of Charles & Henry Barber. The high standard of the firm was still maintained.

Mr. BARBER was an able lawyer and an able advocate. He was equally at home before a jury and before the bench and in consideration of weighty matters in his office. He was an all-around lawyer of unusual versatility. He was able in research but more able in initiative. He could search out legal principles as declared in treatises and decisions. He knew the books. But he was more skilful in discovery, by reflection, of new principles and the application of them to new situations. He drew from the authorities and from his initiative genius as well. He proceeded upon and was skilful in the application of broad general principles.

He never shirked work or responsibility. He was courteous to his fellows and especially kind to his younger professional brothers. They remember well a familiar saying of his that "The law is a science, but the practice of the law is an art." He understood both thoroughly.

Among the many important fruits of his legal battles was the decision in *Beecher v. Weatherby,* 95 U. S. 517. Therein was established the right of the state to the sixteenth sections in the Indian reservations, a very important determination respecting the construction and operation of federal grants. This case he argued at the age of twenty-six.

Also the preservation to the city of Oshkosh of the noble Harris gift for the beneficent purpose of a public library (*Danforth v. Oshkosh,* 119 Wis. 262).

Also the preservation to the city of the noble Beach gift for the beneficent purpose of the manual training school (*Maxcy v. Oshkosh,* 144 Wis. 238).

Such was the confidence of his fellow-citizens in Mr. BARBER as a lawyer that in case of call for legal services in aid of the law officer of the city the choice almost always fell upon Mr. BARBER.

For more than thirty years he was legal counsel for the Chicago, Milwaukee & St. Paul Railway Company.

The state and federal Reports tell a large part of his life's story. The legal history of Wisconsin cannot be properly written without a recital of Mr. BARBER's services at the bar.

He was a member of the American Bar Association and one of the vice-presidents of that organization. He sought no political

Charles Barber.

preferment, but did not avoid his share of the burden of public service. He served at times as superintendent of schools, as city attorney, and as a member of the public library committee.

He was a constant student and great reader. He acquired large and varied information by years of systematic and well-directed study. His briefs and writings are strong and logical. He was a man of sterling integrity, of great moral courage, unblemished honor, and a profound sense of duty. He was a man of strong personality, uniform courtesy, and kindly sympathy. These commanded the respect and won the friendship of all who knew him well. It can be said that in him were thoroughly combined in a rare degree the virtues, qualities, and excellencies of advocate and citizen.

He was a Democrat and thoroughly believed in the doctrines of the earlier school of Democracy. He had courage to stand by his political convictions. His counsel, advice, and example were of value to his party.

In the consideration of public questions he went to the root of the matter, discarded the nonessentials, adopted sane opinions and stood courageously by them.

He could not abide the sycophant, the demagogue, nor any of the "miserable aims that end in self." He stood for humanity. He had many charities and gave freely in a material way, and, what was more important, he gave his healthy-minded consideration and advice. Wherever he was known he was respected, admired, and beloved. This esteem was inspired by his rugged honesty, which stood four-square before the world, and this affection was begotten by his great heart.

He was not only a broad and able lawyer, but he was also a staunch but liberal churchman. He was for thirty years a vestryman of Trinity Episcopal Church. He was a pillar of strength to that church, but in that church he encouraged no bigotry or intolerance.

He was a model family man and model husband and a model father, a model churchman, a model citizen, as well as a model lawyer. Whatever the situation or combination, he always wished and sought to carry somewhat more than his fair share of the burden. He was an unusually companionable and lovable man.

His family, his church, his fellow citizens, his clients, his brother lawyers, and the judges mourn his loss. The memory of his life will be an inspiration to us all.

MOSES HOOPER.
MENZO H. EATON.
EDWARD J. DEMPSEY.
F. J. BARBER.
MAYHEW MOTT.

Resolved, that the foregoing memorial be adopted and that the same be presented to the circuit court for Winnebago county and to the supreme court of the state of Wisconsin with the request that the same with this resolution be spread upon the records thereof, and that a certified copy of this resolution with memorial be transmitted to the widow and family of the late CHARLES BARBER by the clerk of the circuit court for Winnebago county, Wisconsin.

Dated at Oshkosh, Wisconsin, April 10, A. D. 1915.

Mr. Justice OWEN responded:

The intelligence of the sudden death of CHARLES BARBER caused me a distinct shock. We were at the time associated in the case of *Oshkosh Water Works v. Railroad Commission.* While we represented different parties, our interests were identical, both endeavoring to sustain the order of the Commission. He participated in the trial before the circuit court for Dane county, but died before the case came on for hearing in this court. This was one of the important cases with which he was connected at the time of his death and may well be added to the list of cases, mentioned in the memorial, in which he was employed by his home city to protect public interests. Our mutuality of interest in this case afforded me an opportunity to know him as a lawyer, and from such acquaintance I can unreservedly join in the sentiments expressed in the memorial concerning his professional attainments.

He was industrious and intelligently studious. He not only had a comprehensive knowledge of the books but he possessed legal originality and initiative—the power of legal reasoning and analysis which makes great lawyers. He was of forceful character and militant disposition, free from trickery, cunning, or sinuosity. He fought hard, but waged fair and honorable warfare. He loved the law and revered professional standards. He was not a man to prostitute professional ethics nor bring reproach upon juridical administration.

The high regard which he entertained for the law, the legal profession, its standards and ideals, is revealed by a reference to his remarks to this court upon a similar occasion, when he said:

"To my mind there can be no higher honor in store for the lawyer than to have at the end of his life the tributes of bench and bar as to his worth recorded in yonder book. To some there may be other temples of fame more alluring, but to the true lawyer what place could be more attractive than the scene of his labors in which to have preserved the memory of his good deeds and achievements? What tablet more appropriate and enduring than the Reports of this court, in which are written, side by side with the story of his daily struggles and labors, the generous eulogies of his brother attorneys and the sincere tribute of the court before which for many years he appeared?"

Such sentiments are cherished and so feelingly expressed only by the true lawyer.

His professional reputation extended far beyond his personal acquaintance. I knew of him long before I became acquainted with him. No student of the Wisconsin Reports can fail to note the frequent appearance of his name, or the name of the respective firms of which he was a member, in connection with important litigation. It has been given to but few men to be more frequently before this court. Its Reports testify abundantly to his busy and successful practice. He commenced his practice in 1874. Although it was not his first appearance in this court, he personally argued six cases at the January, 1877, term, and one other case was submitted on a brief signed by the firm of Finch & Barber, of which he was a member. He appeared in seven out of thirteen cases coming from Winnebago county. Thus, quickly, did he take a prominent place at the Winnebago county bar. From that time down to the time of his death it is safe to say that he had business at nearly every term of the court.

When we consider the character of his contemporaries in his section of the state, such sound, versatile, and brilliant lawyers as Bouck, Felker, Thompson, Kerwin, Bragg, Greene, and others who have been summoned by death, as well as the many strong members of the bar who survive him, we realize that his success could not have been attained by mediocrity.

By these proceedings we accord him the honor richly deserved and greatly coveted by him. The memorial and response will be made a permanent record of this court, thus placing in enduring form this tribute to the life and service of the lamented CHARLES BARBER.

FREDERICK C. WINKLER.

Mr. Charles F. Fawsett of Milwaukee addressed the court as follows:

May it please the Court:—I have been commissioned to present to this court the following

Memorial of the Milwaukee County Bar Association.

FREDERICK CHARLES WINKLER died March 22, 1921. He was a son of Carl and Elizabeth Winkler, and was born in Bremen March 15, 1837. His father came to Milwaukee in 1842. His wife and children followed him in 1844. FREDERICK C. was educated in the public schools of Milwaukee and at Engelman's Academy. At the age of eighteen he began studying law in the office of H. L. Palmer. At twenty-two he moved to Madison to study in the office of Abbott, Gregory & Pinney, was admitted to the bar at

Frederick C. Winkler.

Madison, April 19, 1859, and returned to Milwaukee to practice. The Civil War almost immediately following, in 1862 he organized and became captain of Company B, Twenty-sixth Wisconsin. He soon became commander of the regiment; was appointed major in November, 1863, and commissioned lieutenant colonel and colonel in 1864. At the muster out of the regiment in 1865 he was brevetted brigadier general and then retired from military service and returned to the practice of law.

He was for a time attached to the military staff of General Carl Schurz and a close friendship between the two resulted.

As commander of his regiment he fought with Sherman and was with him on his march through Georgia to the sea, and along the Atlantic coast through the Carolinas and on to Richmond. He bore a distinguished part in the battles of Gettysburg, Chickamauga, Chattanooga, and in other important engagements, and was active in the service to the end of the war. At its close his regiment was singled out for special commendation and took part in the grand review at Washington.

When the war was over he came back to Milwaukee, took up the practice of law, and practiced his profession with distinguished success until he was compelled to relinquish its active duties at the beginning of 1911 on account of increasing deafness.

Among well known members of the bar with whom he was actively associated in his long professional career, and who are now all dead, were A. R. R. Butler, Theodore Elliott, James G. Jenkins, A. A. L. Smith, John T. Fish, James G. Flanders, and Edward P. Vilas.

He served as vice-president of the American Bar Association and as president of the Wisconsin State and Milwaukee County Bar Associations.

He was prominent in public affairs and presided over many important conventions. In 1869 he was a member of the Republican State Central Committee. His only public office was as a member of the Wisconsin Assembly, to which he was elected in 1872.

In 1880 he was a delegate to the Republican National Convention and took an important part in the proceedings that resulted in the nomination of James A. Garfield for President.

His interest in municipal and state affairs is evidenced by the results of his efforts to establish civil service reform in this city and state. He was long a member of the Wisconsin Civil Service Reform League, acting for a time as its president, and to his personal effort is due much of the success that has been achieved in establishing civil service reform in the city and state.

It seems superfluous to refer at length to his legal attainments. They are indelibly wrought into the records of the courts and into the history of the truly great lawyers of the state. He argued his

first case in the Supreme Court of Wisconsin in 1860, and there is scarcely a volume in the Wisconsin Reports for the next fifty years which does not record his appearances in important cases. He was a familiar figure in all of the courts, and doubtless represented, in the course of his long career, as many important interests and took a leading part in as much litigation of the first importance as any lawyer that ever practiced in the state.

He was thoroughly grounded in the fundamentals of the profession, and was both erudite and practical to a remarkable degree. He possessed the rare quality of mind which intuitively apprehends the correct principles of law which should be applied to a state of facts. His natural endowments were such, and his sense of justice and right was so strong, that he was by nature a great lawyer. To these were added a thorough legal training and long and varied experience in the most exacting duties of the profession. His mind was broad and comprehensive and equally analytical and acute. He possessed what is rarely found in combination, sound judgment and good common sense, highly developed critical faculties, a fine command of language, and a logical mind of great convincing power. He did not have to spend much time in looking for precedents. His well-stored mind contained a wealth of knowledge of the decided cases, and his own legal judgment was so sure and reliable that he could afford to rely upon it. This relieved him of much of the drudgery of the profession which the ordinary practitioner cannot in justice to his clients avoid.

His legal arguments, whether oral or written, were models of directness, clearness, and force. He indulged in no rhetorical flourishes and used no superfluous words, but his language was well chosen, elegant and precise to express the thought he wished to convey. The most prominent characteristics of his methods were directness and candor. His espousal of the cause of a client was a guaranty to both court and jury of his belief in its merits. He went directly to the heart of a question, and usually relied upon the strongest points of his case without wasting effort upon minor questions or arguments of doubtful validity.

The known sterling qualities of his personal character gave him his greatest strength as a lawyer. He was incapable of advancing or arguing a proposition to either court or jury in the truth of which he did not believe; and this well-known quality of his character gave him a position of commanding influence and respect in any case in which he appeared.

There have been many great men in the history of the state, but we doubt if there has been any who in point of personal character, professional attainments, and good citizenship combined with solid achievement, has measured up to the stature of FREDERICK C. WINKLER. We quote and adopt the following recent tribute from

an old-time friend and associate who knew him well from his boyhood days:

"I question if Milwaukee has known a man whose life, public or private, whose character, whose attainments and whose worth and excellence so combined to lift him above the possibility of calumny or criticism; whose shield was so unsullied that even envy was dumb and jealousy dismayed."

A devoted husband and father, in every attribute a gentleman, he was a brave soldier, a model citizen, and a staunch friend. His death has left a vacancy in the lives of those who knew him best that never will be completely filled.

CHARLES F. FAWSETT.
GEORGE D. VAN DYKE.
CHARLES E. WILD.

Mr. Justice ESCHWEILER responded as follows:

To the beautiful tribute to the strong and beautiful character of FREDERICK C. WINKLER, by and on behalf of the Bar Association of the courts and community with which so much of his long life and labors were associated, just presented at the bar of this court, so often graced by his presence, little can or need be added.

Therein are set forth his great value and worth as a citizen and soldier of and in this the land of his choice; his pride in the great profession which he honored by his long and undeviating devotion; and, above all these, there is reflected the beauty and dignity of his self-made place in the ranks of the great army of humanity which rises superior to distinctions of race or creed or avocation. He did so well in all that he undertook largely because he so embodied and exemplified the commonplace virtues of sincerity, integrity, and industry of the common people, those whom Lincoln loved.

Interested in all civic affairs, local, state, and national, yet he yielded but once to the lure of office in becoming the Republican candidate in a triangular contest for Congress in the Fourth district, then comprising all of Milwaukee county, as against the then Congressman, the latter succeeding by a very narrow margin.

He became a good lawyer through the only means within his power to obtain, means which ought to be still preserved for the youth of this land—those of his own efforts devoted to the wisdom of the ages embodied in the books. He became a finished gentleman and scholar from his innate and virile qualities, with no veneer, so often factitious, from schools of higher learning, and with no pumice-stone save daily intercourse with men and books. His indeed was the well-rounded self-made career, the light and like of which, we trust, will never vanish.

As it has fallen to me to respond on behalf of this court to this

the last of his many appearances here, his final response of *adsum* to the roll call of those who have served as ministers herein, I cannot refrain from saying a word from personal knowledge of the lawyer and the man.

He had long been looked up to as one of the prominent leaders of the bar of this state at the time I was admitted, and he so remained; and although I never came in direct business contact with him, yet I knew him and of him as can a younger know the elder practitioner.

I recall with pride, tinged with sadness, that while I was at the circuit he argued a cause before me in his still clear and forceful manner in what was probably his last participation in court proceedings.

At one time he lent me the honor of his name and influence, and I can only now for the first time, he being gone, express the gratitude which I felt and feel for that and of which, in the modesty of his living, he would not have cared to hear.

A good soldier and citizen of this country and this commonwealth, in war and in peace, has struck his tent here and set it up on the camp-grounds of eternity. His memory shall be preserved so long as the records of this court, to which it is now committed, shall endure.

THOMAS LATHROP KENNAN.

Mr. Orren T. Williams of Milwaukee presented the following

Memorial of the Milwaukee County Bar Association.

May it please the Court:—THOMAS LATHROP KENNAN was born on Washington's birthday, in 1827, at Morristown, New York, and died in Milwaukee August 1, 1920, ninety-three years of age. He was admitted to the Ohio bar in 1849 at the age of twenty-two years. At the time of his death he was the oldest practicing attorney in Wisconsin, having been a member of the bar of this state for more than seventy years. He was a sturdy character and came of notable Scotch ancestry. He first settled in Oshkosh and served as district attorney for one term in Winnebago county. Removing to Portage City, he was admitted to the bar of the Wisconsin Supreme Court in 1857. Portage at that time had a very distinguished bar. Luther S. Dixon, afterwards Chief Justice of the Supreme Court of the state, Alva Stewart, afterwards Circuit Judge, and Guy Prentice, also Circuit Judge, and many others were members of the bar at Portage, which city, it was thought at that time, would become the metropolis of the state of Wisconsin.

In 1907, when Mr. KENNAN was eighty years old, he published a

genealogy of the Kennan family consisting of more than one hundred and twenty pages which required the greatest attention to detail. From the index it appears that more than two hundred names of the Kennan family of ancestors and descendants are contained in the book. The brief preface contains the following:

"This book has been written for the benefit of my children and their descendants in the hope that it may stimulate in their hearts a love for the ties of kindred, and for the memory of worthy ancestors. I hope it will serve to arouse their curiosity concerning the remoter authors of their existence, and induce them to study the character and habits of the founders of this great Republic as represented in their own ancestry."

At the beginning of the Civil War, while he was practicing law in Portage City, he was among the first to enlist. He recruited a company and was chosen captain, but declined the office in favor of a member of the company who had had military training. He entered the service as first lieutenant of Company D, Tenth Wisconsin Infantry. He was with Buel's army in Kentucky and Tennessee and served for a considerable period as deputy quartermaster general at Nashville. Owing to serious ill health he reluctantly resigned his commission and returned to the North. With his usual energy and industry he cleared up a farm on the banks of Buffalo lake in Marquette county and engaged in stock raising on a large scale. He was appointed deputy provost marshal and served the government in that capacity until the end of the war. He also recruited a company of heavy artillery.

Having regained his health, he removed to Portage City and soon built up a large law practice. He was admitted to the Supreme Court of the United States in 1876, and in 1878 became associate counsel of the Wisconsin Central Railroad Company. The most important case which he tried in this capacity was that of *Wisconsin Central Railroad Company v. Price County,* involving the taxability of several hundred thousand acres of lands, which had been selected by the railroad company but the selections had not been approved and therefore no patents had been obtained. The case was first tried before Judge WEBB at Phillips and the court sustained Mr. KENNAN's contention that the lands were not taxable. As the judge was about to leave, Mr. KENNAN immediately after the trial dictated the findings in the case, which can be found quoted in full in Vol. 133 of the United States Supreme Court Reports on pages 501 to 503. The case was appealed to the Wisconsin Supreme Court and the decision of the circuit court reversed. It then went to the Supreme Court of the United States, where the conclusions of law as drawn by Mr. KENNAN were fully sustained.

This litigation, and many other suits which grew out of it, caused him to become well known throughout the Northwest as an authority upon all questions of taxation.

Thomas Lathrop Kennan.

He was for more than forty years a member of the Military Order of the Loyal Legion and a notable figure at the banquets of that organization. He was also a thirty-second degree Mason, a member of the Sons of the American Revolution, the Wisconsin Society of Mayflower Descendants, the Society of Colonial Wars, the Grand Army of the Republic, and of the Old Settlers' Club.

Both Mr. KENNAN and his wife, who died some years ago, were liberal supporters of many Milwaukee philanthropies. He was a man of strong religious convictions, and, at the date of his death, the oldest member of Immanuel Presbyterian Church. His integrity was of a staunch and sterling type which knew no compromise in matters of conscience. "His patriotism," says Judge BURNELL, "was a part of his religion, and he had lofty ideals of what it meant to be a citizen of this great republic."

He made a record at the bar for painstaking industry, integrity, and sound judicial conclusion which should not be overlooked or forgotten. It is impossible in these short annals to refer even briefly to the many important cases with which he was connected in the seventy years' practice at the Wisconsin bar, but your committee feels that it would not be doing justice to his memory or to his friends and relatives in the city of Milwaukee not to mention his untiring devotion to the Milwaukee Protestant Home for the Aged. It was mainly through his efforts in 1890 that the grounds now belonging to that institution were obtained from the city of Milwaukee, virtually as a gift. For over thirty-six years, without fee or reward, he performed legal services for the Home, often in the courts in important litigation. In every contested matter he was successful. From the establishment of the advisory committee in 1892 until his death he was a member of that committee and was thus in close touch with all the investments of the endowment funds of the Home. He was the counselor and friend of all the members of the Home family. All sought his advice, all accepted his judgment, all looked to him as one who was interested in their welfare and in the promotion of their interests. The Home will have other and younger attorneys, but none who will ever have that close intimate and personal relation with the old people for whom this benevolent institution has proved a home indeed, as had Mr. KENNAN.

Gerry W. Hazelton, lately deceased, who was a most honored member of this bar at the time, says he first met Mr. KENNAN at a term of the circuit court for Columbia county in the year 1857, and he adds: "It is due Mr. KENNAN to say that his real worth was more thoroughly appreciated by his family and by his immediate friends than by any one else. He was a kind, affectionate, and devoted husband and father and his home was the center of his affections. His memory will be tenderly cherished by those who knew him best."

James Graham Jenkins.

Mr. KENNAN was born of sturdy New England stock accustomed to habits of industry and temperance, a most patriotic citizen and lover of his country. He was a zealous and painstaking student of the law, a Christian gentleman, a sympathetic friend and adviser.

Your committee begs to submit this memorial and asks that it be spread upon the minutes of the proceedings and that a copy be sent to his children residing in the city of Milwaukee.

September, 1921. Respectfully submitted.

ORREN T. WILLIAMS,
Chairman.
CHARLES M. MORRIS,
JOHN M. W. PRATT,
Committee.

Mr. Justice JONES responded:

As stated in the memorial, Mr. KENNAN was born on Washington's birthday in 1827. John Adams and Thomas Jefferson both died July 4, 1826. Thus it appears that Mr. KENNAN's long and useful life spanned the period between the early days of our republic and the close of the great World War. It was nearly a century, crowded with the most momentous events in our world's history.

In his boyhood he doubtless knew some of the heroes of the American Revolution. From them he had his lessons of patriotism at first hand. Those lessons were enough to inspire him with the desire to fight in the Civil War to save the government they had helped to found.

In Mr. KENNAN's middle life I knew him very well. I knew him as a modest, able, resolute lawyer who had acquired the confidence of many clients who trusted him implicitly in the ordinary affairs of life. He had gained such a reputation as one skilled in the law of real estate and tax matters that he also represented those having large interests in land and railroads.

Mr. KENNAN was one of the last of the sturdy, high-minded survivors among the pioneers of the Wisconsin bar, and well worthy to have his name and memory perpetuated in the record of this court.

JAMES GRAHAM JENKINS.

On the 13th day of December, 1921, Mr. Benjamin Poss of Milwaukee presented the following:

May it please the Court:—The committee appointed by the Milwaukee County Bar Association for such purpose herewith presents for record in this court a memorial of the life of the late Honorable JAMES G. JENKINS, who died in Milwaukee, Wisconsin, on the 6th day of August, 1921.

James Graham Jenkins.

Memorial of Milwaukee County Bar Association.

JAMES GRAHAM JENKINS was born at Saratoga Springs, in the state of New York, July 18, 1834, the son of Edgar and Mary Elizabeth Jenkins. His maternal grandfather, Reuben Hyde Walworth, was a judge of the Supreme Court of New York and chancellor of that state. His father, Edgar Jenkins, was a merchant of New York City. The son was educated in private schools, and began the study of law in the office of Ellis, Burrill & Davison, New York City. He was admitted to the bar in New York in 1855 and entered at once upon the practice of his profession. In the year 1857 he removed to Milwaukee. In February, 1870, he married Alice Mary Miller, daughter of Honorable Andrew Galbraith and Caroline (Kurtz) Miller. Andrew Galbraith Miller was then United States district judge for the district of Wisconsin. In 1863 JAMES G. JENKINS was elected city attorney and continued in this office during four terms. In 1879 he was the candidate of the Democratic party for governor of this state, and in 1881 he received the vote of the Democratic members of the state legislature for the office of United States Senator. On July 2, 1888, he was appointed United States district judge for the Eastern district of Wisconsin, and on March 23, 1893, he was appointed to the office of United States circuit judge for the Seventh judicial circuit, which includes the states of Indiana, Illinois, and Wisconsin, to succeed Honorable Walter Q. Gresham, who resigned upon his acceptance of the office of Secretary of State in President Cleveland's cabinet. On April 11, 1905, Judge JENKINS resigned his judicial office and retired to private life. From 1908 to 1915 he was dean of the Law School of Marquette University in Milwaukee.

Judge JENKINS came to Milwaukee to engage in the practice of the law—"a stranger in a strange land." He was then twenty-three years of age. He came not only wholly unknown to the community but without financial resource or assurance of any clientele. However, he was endowed with those attributes which do not fail of success. He had enjoyed a thorough fundamental training. He was resolute of will; he had a strong native intellect and a well disciplined mind. He was endowed by nature with a charm of manner and person and combined with these a persuasive personality. He possessed in a marked degree the gift of eloquence, but knew full well the imperative need of industry and perseverance for success in the law. It was but natural, then, that he should soon win a place among his contemporaries in the city of his adoption.

He came from a state in which the Code had been in force for some time, and he came to Wisconsin at a time when the Code had been just adopted. By reason of his knowledge of practice under this departure from common-law pleading and practice, his talents were immediately commanded by the older lawyers not yet familiar

with the Code. Judge JENKINS progressed speedily and soon became a force and power in the profession and in the community.

He was an influential leader in the Democratic party, and the pages of the political history of this state, during his years of activity before his promotion to the bench, record his participation in public affairs. His services were much in demand as an orator at political meetings and upon nonpartisan public occasions. We have said he was a man of eloquence and personality; these attributes were manifested throughout this period of his life. In the newspapers and other publications of that day we find a wealth of evidence of his staunch support of every righteous cause appertaining to the public. The down-trodden and oppressed—whether in this country or in foreign lands and whatever their race, religion, or color—found in him a champion who spoke and wrought for their betterment and for the betterment of mankind. He was a man of scholarly attainments, but believed not in the indulgence of his learning for his own selfish purpose. He gave of himself to the state to the full extent of his learning and knowledge of practical affairs.

His handsome appearance, his pleasing address and personal charm, combined with a practical knowledge of men and affairs and a happy faculty of presenting a case—whether to the court or to the jury,—all wrought for his complete success. At all times did his arguments win the respect of the court by reason of his thorough preparation and faultless manner of presentation, and as a jury lawyer he was without a peer. His participation as an advocate in any cause attracted to the court-room an admiring public, and his addresses to the jury captivated the jury, the court, and all within hearing. In cases involving personal rights his eloquence rose to great heights; his illumined countenance reflected the zeal, enthusiasm, and fire of the spirit within; he marshaled his facts in masterly style; presented his case in glowing words; thus he quickly aroused the sympathy of the jurors and convinced and persuaded them to his cause. In him were wonderfully combined powers of a court and jury lawyer; and he was a lawyer in every sense of the word. He was steadfast always in his adherence to the duties which our profession imposes upon us; he was cognizant of the professional obligation to co-operate with the court in furthering the administration of justice; he recognized the obligation of an advocate to his client and his cause, and with all the power of his being and force of his learning he supported that cause to the full. Such a man, so endowed and so proficient in the discharge of his professional labors, duties, and obligations, incited the admiration of his time and inspired his professional brethren in the generations that follow.

In the course of his practice—the Reports of the Supreme Court of Wisconsin from Volume 7 to Volume 71, during which time this

court was presided over by Chief Justices WHITING, DIXON, RYAN, and COLE, attest to his activity as a practitioner—he became associated in well known legal partnerships; those of Downer, La Due & Jenkins; with E. G. Ryan, the great jurist, and United States Senator Matthew Hale Carpenter, under the firm name of Ryan, Carpenter & Jenkins; with Mr. Theodore B. Elliott and General Frederick C. Winkler, that great lawyer whose memorial was recently presented to this court, under the firm name of Jenkins, Elliott & Winkler; and with the firm of Jenkins, Winkler, Fish & Smith. He was of a generation that knew Ryan, Butler, Carpenter, Dixon, Arnold, and others—giants in the law—long since gone to a Higher Court.

As a leading member of the bar Judge JENKINS contributed in great measure to the development of the law in this state. Principles of common law and rules of statutory construction—today elementary—were first advocated and successfully pressed by him upon the consideration of the courts of this state.

He was thoroughly imbued with the spirit of the profession, and he believed in perpetuating that spirit not only as a practicing lawyer but also in giving of his talents and ability toward the struggling youth of the profession. He was an instructor in the John Marshall Law School in Chicago, Illinois, and, as hereinbefore stated, after his retirement from the bench became dean of the Law School of Marquette University in Milwaukee. He was ever ready to encourage the young lawyer. Sometimes the older lawyers forget the trials and uncertainties of the early period of a lawyer's life, forget that those who have just crossed the threshold to enter into the inner halls of the profession will in habit of thought, of reasoning and conduct, follow the examples and precepts of their elders. Every succeeding generation conforms to the mold made by its predecessors; the young lawyer has a right to look to his elders for guidance, the right to expect from them the finest expression of the ideals of our profession, not that they may win glory and gain for themselves, but that the profession, to which has been intrusted in all times the earthly administration of God's justice, may continue on a high plane of effectiveness and nobility. The regard manifested by Judge JENKINS towards the young man is beautifully expressed in his addresses to graduates of law schools; they breathe a wholesome atmosphere of kindliness and affectionate concern; they are studded with bright jewels of philosophy, formed of years of observation and experience, radiating a glow of hope and encouragement. Judge JENKINS's appreciation of the young man's greatest need—a thoughtful word and helping hand—was not only personal but partook, we know, of another and equally fine metal; back of it was the consciousness that the perpetuation of righteousness and truth and justice depends upon the perpetuation of the highest ideals in the profession and that they who have

reached the summits are obligated to give of their counsel to those who struggle at the base.

In 1888, upon his appointment to the office of United States district judge, Judge JENKINS was truly at the head of the bar of Milwaukee county and state of Wisconsin. He accepted this office at a great financial sacrifice, but he realized his duty to the profession and state, and his acceptance was proof of his belief that the lawyer, when called to judicial office, should respond to that call without regard to personal loss or sacrifice. His career as a lawyer foreshadowed his brilliant future on the bench. To his judicial office he brought the full powers which he acquired in the stress and struggle of daily professional life, a broad and comprehensive knowledge of the law, a keen analytical mind, exact legal reasoning, a true sense for the application of the philosophy of the law, and those high qualifications, best described in his own words in an estimate of another judge—"An invincible honesty of purpose, a thorough impartiality, and an utter disregard of all personal consequences flowing from his judicial decrees." By virtue of his office he sat as a member of the first session of the United States Circuit Court of Appeals of the Seventh judicial circuit, then created, his colleagues being Mr. Justice HARLAN of the United States Supreme Court and the late Judge GRESHAM. The first opinion delivered by that court, involving a case of admiralty law, was a product of his mind and pen. His opinions are found in more than one hundred volumes of the Federal Reporter and in all of the Circuit Court of Appeals Reports, containing the opinions for this circuit.

The law of unfair competition in trade, a department of then quite recent development, bears the indelible impress of his judicial learning. High authority declares that the leading case—opinion written by Judge JENKINS—of *Pillsbury v. Pillsbury-Washburn Company*, reported in the 24th United States Appeals Reports, will ever be referred to as authority in the law of unfair competition in trade. Judge JENKINS, however, was not a specialist. The Reports attest to his broad and general comprehension of legal principles in every department of the law.

In the case of *Farmers Loan & Trust Co. v. Northern Pacific R. Co.* 60 Fed. Rep. 803, Judge JENKINS, then sitting as United States circuit judge, at *nisi prius*, issued what became known as the famous injunctional or "strike" order. Upon the issuance of this order the jurist and the decree became a storm-center of debate in the public press and in the national House of Representatives. As is so often the case, the meaning and effect of the decree were misconceived by a part of the public, either through ignorance of its exact terms or by a desire on the part of some to bring opprobrium upon the judge and on the bench. In the course of the judicial proceedings in the court presided over by Judge JENKINS, involving the re-

ceivership of this large railroad company, an order was issued for the purpose of preventing a threatened strike on the part of the employees of the many departments of the company. Among other things the decree restrained such employees

"from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers, with or without notice, as to cripple the property, or to prevent or hinder the operation of said railroad."

In his opinion with respect to this decree Judge JENKINS stated:

"None will dispute the general proposition of the right of every one to choose his employer, and to determine the times and conditions of service, or his right to abandon such service—to use the expression of Judge PARDEE in *Re Higgins, supra* (27 Fed. Rep. 443)—'peaceably and decently.' But it does not follow that one has the absolute right to abandon a service which he has undertaken, without regard to time and conditions. It is absurd to say that one may do as he will without respect to the rights of others. It is not infringement upon individual liberty to compel recognition of the rights of others. Liberty and license must not be confounded. Liberty is not the exercise of unbridled will, but consists in freedom in action, having due regard to the rights of others. . . . Rights are not absolute but are relative. Rights grow out of duty, and are limited by duty. One has not the right arbitrarily to quit service without regard to the necessities of that service. His right of abandonment is limited by the assumption of that service and the conditions and exigencies attaching thereto. It would be monstrous if a surgeon, upon demand and refusal of larger compensation, could lawfully abandon an operation partially performed, leaving his knife in the bleeding body of the patient. . . . Ordinarily the abandonment of service by an individual is accompanied with so little of inconvenience and with such slight resulting loss that it is a matter of but little moment when or how he may quit the service. But, for all that, the principle remains, recognized by every just mind, that the quitting must be timely and decent, in view of existing conditions; and this, I take it, was Judge PARDEE's meaning by the expression 'peaceably and decently.'"

Prompted by selfish motives, there were some who attempted to seek impeachment of Judge JENKINS upon the ground of the issuance of the decree in this case. A committee of the House of Representatives, acting through a subcommittee, held a session at Milwaukee for the purpose of taking testimony in relation thereto. This committee issued an invitation to Judge JENKINS to appear before it. It is interesting to observe Judge JENKINS's reply to this request, as it reflects the stalwart nature of the man and his conception of the spirit of our laws and their administration. It was in part as follows:

"With respect to your request that I inform you whether I desire to appear before the committee, I have the honor to reply that as I read the resolution, and so far as I am advised, the query contemplated has reference only to the propriety and legal correctness of the orders of the court. If I am therein correct, I perceive no good purpose to be served by my appearance before your committee. If, however, the committee is charged with the duty of inquiring into any charges affecting my personal or official integrity, I shall be glad of an opportunity, upon being informed of such charges, to appear before your committee and to meet and refute them."

The subcommittee reported at some length, taking issue with Judge JENKINS solely upon the law of the case. There was, of course, no impeachment. An appeal was taken from the decree of the court to the Circuit Court of Appeals; the decree was upheld with but slight modification, and in the opinion thereon, written by Mr. Justice HARLAN of the Supreme Court of the United States, who presided at the hearing of the appeal, it was said:

"Indeed, upon the facts presented by the receivers and admitted by the motion of the interveners, it was made the duty of the court to exert its utmost authority to protect both the property in its charge and the interests of the public against all strikes of the character described in the opinion of the circuit judge."

Upon his appointment to the office of United States circuit judge, Judge JENKINS became the presiding judge of the Circuit Court of Appeals for this circuit and he discharged his duties as such with dignity.

As a jurist the name of Judge JENKINS will long endure; the judicial records of this country will remain a lasting tribute to his great juridical ability. In his written opinions Judge JENKINS sought primarily to express in exact language the law of the case. These opinions reflect not an easy flowing style possessed by some, which comes readily and without effort, but a style rather which reflects studied effort and an intense desire to be effective rather than literary. These opinions possessed, rightly expressed, an effective legal style. He drew from his rich storehouse of words, moulded these into carefully constructed phrases, and refined and polished them with a true artistic instinct. On the bench, as at the bar, Judge JENKINS exemplified the high purposes of his legal calling. Well may we say—he was a great lawyer and a great judge.

The private life of Judge JENKINS was ideal; his marriage was a happy one; his home a center of culture and refinement. While his marriage was not blessed with children he loved the little ones and their laughter and prattle were ofttimes heard in his home. His private library was large, covering works of science, history, and literature, and included many books in a lighter vein. He read much, was a close student of the Bible and classics; his retentive

memory enriched his mind with the thoughts and expressions of the masters; in conversation he delighted with his fund of literary knowledge and his allusions to the world of learning. He loved to be with his friends; he liked a good story and himself loved well to tell it. He traveled widely and concerned himself outside his professional pursuits with all matters of public interest. By nature and training he was qualified for high service in his profession and in the high public stations which he held. He devoted his life to noble pursuits and by word and deed contributed to the progress of civilization. He was a man of integrity; he was a man of sincerity; he hated cant and despised hypocrisy.

"He put his creed into his deed
Nor spake with double tongue."

We cherish his memory. The world is better for his having lived; a life so spent must and will leave its influence, not only in its own time or day but for all times. As a man, a lawyer, and a jurist, the departed sought to and did realize the highest standard; he discharged the duties and obligations that confronted, recognizing them as a solemn duty which demanded fulfilment. He rendered great service to the state; but above and beyond that, his life teaches that in this age of commercialism there are some things better than gold or silver; that greater regard should be had for honor and truth and fealty to duty; that a good name is better than great riches. His life points the young lawyer to the goal which he may obtain if he apprehends properly the nature of his profession and is true to its ethics. It teaches that

"The temple of Fame, wherein are enrolled the names of those who have faithfully ministered at the altar of justice and kept burning the lamp of truth, honor and truth and right are in high regard and may not be sacrificed to vulgar gain."

Judge JENKINS's philosophy of life is best illustrated by his own words spoken in this court upon the presentation of the memorial of another great lawyer:

"The value of a life is not to be measured by the degree of its success, as success is commonly defined. By that standard, failure may in truth be victory, success defeat. It is the actuating motive of the life, the use of the life made by the liver, and the force of the life as an example, which determine its worth.

"In the estimation of the world of his day the career of the Man of Nazareth was a dismal failure, ending in an ignominious death; but the standard of conduct declared by him has proved the leaven which bursts the shell of selfishness and which will avail to stay relapse into barbarism. The despised and the outcast of his time is today the foremost figure in history, the beacon light of humanity.

"He who acquires great possessions is in the eye of the world a successful man; but he may be merely the vulgar miser whose life

is worse than useless. The man of study, the man of science who reserves for mere personal enjoyment and use the knowledge acquired, comes short of the correct standard of the value of life, and is of little moment to the world. It is by spending that one can save. It is by giving that one can have. By this is not meant indiscriminate distribution, but that wise, practical spending and giving which benefits humanity and enriches the giver in those things which make for character and worth."

Though dead, Judge JENKINS still speaks in defense of society, for the safety of the state, for the welfare of the people, for upright life and conduct; he still speaks for the honor and dignity of our noble profession, and his message to us is to advance yet higher the standard of professional honor and of professional attainments.

We respectfully ask the court to direct this memorial to be perpetuated on the records of the court.

Respectfully submitted,

BENJAMIN POSS,
LOUIS A. LECHER,
WM. D. VAN DYKE,
FRANK M. HOYT,
ARTHUR W. FAIRCHILD,
Committee.

The presentation of the foregoing memorial was followed by remarks by Mr. Frank M. Hoyt of Milwaukee, no record of which has been preserved.

Mr. Justice JONES responded as follows:

My acquaintance with Judge JENKINS began in 1872. Although only thirty-eight years old, he was already one of the recognized leaders of the Wisconsin bar, a rank which seldom comes until a riper age.

The younger members of the bar were then watching his career, and, when opportunity offered, eagerly observed his skill in the conduct of his cases and listened to his brilliant arguments.

One lawyer attracts attention by his eloquent addresses, another by his tact and skill in the examination of witnesses, another by his profound knowledge of the law. One wins fame as a jury lawyer, another by his success in presenting to the court intricate questions of law. It would be hard to say whether Judge JENKINS was more successful in contests before juries or in presenting arguments to a court. In both fields he was a master.

Combined with this versatility were a sincerity and a consideration for others and a courtliness of manner which won for him the

admiration of judges and juries and witnesses alike and made him the idol of the younger members of the bar. He was one they sought to emulate, and his life was an inspiration to those who sought to be worthy and honored members of a great profession.

He did not cherish the delusion that has been fatal to the success of so many gifted lawyers, that mere eloquence could win his cases or raise him to the heights of his profession. While he loved and studied the masters in literature, and while his utterances constantly bore evidence of this, he paid his first allegiance to the law. He understood full well that more cases are lost by lack of preparation than by mismanagement in court. With this combination of native talent and industry it was natural that he should win primacy at the bar.

We are told in the memorial that at different times he was associated as partner, among others, with E. G. Ryan, Matthew Hale Carpenter, John T. Fish, and Frederick C. Winkler. The lives of Judge JENKINS and these four associates would furnish a striking epitome of the ambitions, the struggles, the achievements, and the greatness of the Wisconsin bar in their generation.

During the first half century of Wisconsin history hardly any eminent lawyer could avoid some participation in politics. Until Judge JENKINS went upon the bench he was closely identified with the Democratic party. He mourned over its misfortunes, and there were many, and rejoiced in its triumphs, which were few and far between. It sometimes excited surprise that one of such courtly manner, one so unmistakably of gentle birth, should be at home with the party of the plain people, then so often called the party of the "great unwashed." Nevertheless he was the idol of his party. In conventions they listened to his counsel; they hung upon his words in his campaign speeches. Again and again they begged him to be their candidate for governor. Once he yielded, and met the defeat he knew was certain.

Of course his enduring fame will rest upon his judicial career, and with that the memorial has so adequately dealt that any further analysis would be repetition. I am dwelling more upon his career as a lawyer because in the pioneer life of our state the influence of such a man with such activities as his was hardly less important than if he had been cloistered in the seclusion of the bench.

For a time the fame of the lawyer may be wider than that of the judge. He is far more in the public eye. His name is more apt to be a household word; but it is a fleeting fame. For a generation or so there will be traditions of his eloquence or wit, of his connection with this or that celebrated case, of some gladiatorial contest with another advocate in some exciting cause. But, as Judge JENKINS once said, "The fame of the advocate is ephemeral, fading with the

memories of those who heard him. We write the record of our lives upon the sand. The incoming tide of a succeeding generation blots out the record forever."

Still, when a great lawyer with high ideals devotes a life to the practice of the law and such unofficial public service as is always incidental to such a life, even though no Congressional Record contains his name, and no volume reports his decisions, he wields an influence which lasts long after his earthly career is ended. Judge JENKINS was fortunate in that as a lawyer he wielded such an influence, one which was an inspiration to his brethren, and also because as a judge he was able to help in building the enduring fabric of our jurisprudence. He was fortunate indeed in his long and happy life. It was one of arduous toil, but it was a toil he loved. Until almost the close of his eighty-seven years he entertained his friends by his delicious humor and his reminiscences of bygone days. He was young in his old age, when he had honor and troops of friends.

His career beckons the earnest young lawyer to the life of happiness and usefulness and honor which may await him. As he descended the hillside of life he found its sunniest paths, and cheered his companions on the way.

The memorial offered by the bar will be received and made a part of the records of this court.

CASES DETERMINED

AT THE

August Term, 1921.

WILL OF JOHNSON.

April 7—September 23, 1921.

Wills: What law governs: Law as of time of death: Subscribing witnesses: Competent witnesses: Who may testify: Primary and secondary evidence: Statutes: Presumption against change from fundamental principles.

1. A will is ambulatory during the life of its maker and is in effect reiterated as his testament at each moment of his life after its execution, and is governed by the law existing at the time when it takes effect, upon the testator's death.
2. Under sec. 2284, Stats. 1898, as amended by ch. 128, Laws 1905, providing that all gifts made in a will to a subscribing witness shall be wholly void unless there be two other competent witnesses to the same, two other competent *subscribing* witnesses are required, and not merely two other persons who can testify to facts showing the execution of the will in conformity with the statute, as the phrase "witness to a will" means one who has attested the will by subscribing his name thereto.
3. The testimony of the subscribing witnesses to a will constitutes primary evidence of its execution, and other or secondary evidence cannot be resorted to for that purpose until after a showing that the subscribing witnesses are dead, beyond the jurisdiction of the court, or are *non compos mentis.*
4. The common law of this country is that all of the subscribing witnesses must be produced when a will is offered for probate, unless the impossibility of producing them is made to appear; and the only modification of this rule in this state is in sec. 3788, Stats., providing that if there is no objection to the probate of a purported will the court may, in its discretion, grant probate on the testimony of one subscribing witness only.

5. A mere bystander is not a witness to a will, much less a competent witness; and his testimony could be introduced only upon a showing that the primary evidence could not be produced.
6. The presumption in construing statutes is against any radical change of legislative policy, and it is presumed that there is no intention to depart from any established policy of the law or to innovate on fundamental principles.

ROSENBERRY and ESCHWEILER, JJ., dissent.

APPEAL from a judgment of the county court of Racine county: M. S. SHERIDAN, Acting Judge. *Affirmed.*

For the appellant there was a brief by *Wallace Ingalls*, attorney, and *Simmons & Walker*, of counsel, all of Racine; and the cause was argued orally by *Mr. John B. Simmons* and *Mr. Ingalls.*

For the respondents there was a brief by *McCulloch, McCulloch & Dunbar* of Chicago and *Thompson, Myers & Kearney* and *Hand & Quinn* of Racine, and a separate brief by *Thos. M. Kearney, Jr.*, of Racine, guardian *ad litem;* and the cause was argued orally by *E. B. Hand* and *Thos. M. Kearney, Jr.*

The following opinion was filed May 31, 1921:

OWEN, J. This is an appeal from an order or decree of the county court of Racine county construing the will of Theodore W. Johnson, deceased. The case was here on a former appeal from an order admitting the will to probate, and is reported in 170 Wis. 436, 175 N. W. 917, to which reference may be had for facts supplemental to those which will appear in this opinion.

The will of Theodore Johnson constituted *Mrs. L. C. Hahn* the principal beneficiary. She was a witness to the will. The question involved on the former appeal was whether she could testify to the execution of the will. It was there held that she could. The question presented on this appeal is whether *Mrs. Hahn* is entitled to the bequest made to her by the terms of the will. The county court held that

the devise and legacy to the said *L. C. Hahn* was and is void because she is a subscribing witness to the will and said will is not attested or subscribed by two other competent witnesses.

There is no serious contention but the law as it existed at the time of the death of the testator is the law that governs as to the question whether *Mrs. Hahn* can take under the will.

"A will is ambulatory during the life of its maker. It is, in effect, reiterated as his testament at each moment of his life after its execution, including the last moment, and is governed by the law existing at the time when it takes effect, upon the testator's death." *Will of Kopmeier,* 113 Wis. 233 (89 N. W. 134) at p. 239.

This fact is mentioned at the outset because it is claimed that the statute which, concededly, controls in this case was amended during the interim between the execution of the will and the death of the testator. That statute is sec. 2284. Prior to the enactment of ch. 128, Laws 1905, that section provided as follows:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto, shall be wholly void unless there be two other competent subscribing witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will."

By ch. 128, Laws 1905, that section was amended by voiding gifts made to the husband or wife of a subscribing witness, as well as to the subscribing witness himself, and by dropping out the word "subscribing," so that it now provides that such devises, legacies, and gifts "shall be wholly void unless there be two other competent witnesses to the same." As so amended the section now reads as follows:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a subscribing witness thereto,

or to the husband or wife of a subscribing witness thereto, shall be wholly void unless there be two other competent witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will."

It will be seen that the purpose of the statute is to void gifts made to a witness to a will, so that a subscribing witness may be a competent witness and the will be established by the testimony of the subscribing witness, unless the will cannot be established without his testimony. That, at least, was clearly the purpose of the statute as it existed prior to the amendment of 1905. It is not seriously disputed that such is the present purpose of the statute, but it is contended that the bequest is saved to the attesting witness if there is another person who can testify to facts showing an execution of the will in conformity with the requirements of the statute. This contention is based on the theory that the amendment dropped out the word "subscribing" and hence the bequest is now saved to a subscribing witness if there is any other competent witness to the same.

It is said that it is not necessary that a competent witness be a subscribing witness. Our first suggestion in response to this contention is that the phrase "witness to a will," or any other written instrument, has a well settled meaning not only in common parlance but in the law. A witness to a deed means a witness who has attached his signature to the deed. A witness to a will means one who has attested the will by subscribing his name thereto. Furthermore, the statute as it now exists requires two other competent witnesses to the will. We take it that the term "competent" as used in this connection means something more than a witness who is free from the many disqualifications visited upon persons by the common law; that is to say, it means not only a person who is under no disability to testify generally in a court of justice, but it means a person who is under no disability to give testimony which will establish the instrument as the will and testament of the testator.

It has been the ruling of courts ever since the statute of frauds required certain instruments to be in writing and signed in the presence of witnesses, that the testimony of the subscribing witnesses constituted primary evidence of the execution thereof by the parties bound thereby, and that no other evidence of such fact could be given until the person seeking to establish the instrument demonstrated his inability to produce the subscribing witnesses because of their death, their absence from the jurisdiction of the court, or that they were *non compos mentis.* It has been universally held that until such showing has been made on the part of him who seeks to establish the instrument, secondary evidence could not be introduced to show the fact of execution. 2 Wigmore, Evidence, § 1287 *et seq.,* and note to *Garrett v. Hanshue* (53 Ohio St. 482) 35 L. R. A. 321, where the general rule upon this subject is summed up as follows:

"The general rule is that the attesting witness to a written instrument is regarded as the person who must be called to prove its execution when he can be had, as it is said that the parties selected him to enable them to refer the execution of the document to him in case any question should arise over its execution. His evidence is regarded as the best evidence, and must be used when the execution is in dispute."

This is a general rule applicable to all written documents which by law are required to be attested by subscribing witnesses. From the time when wills were required to be in writing and attested by subscribing witnesses it has been commonly understood that the will must be proved by the testimony of a subscribing witness if he could be produced, and that other or secondary evidence could be resorted to for that purpose only after a showing that the subscribing witness was dead, or beyond the jurisdiction of the court, or was then *non compos mentis.*

Questions have arisen in some jurisdictions as to whether it was necessary to call all of the subscribing witnesses. *Thornton's Ex'rs v. Thornton's Heirs,* 39 Vt. 122; *Denny*

v. Pinney, 60 Vt. 524, 12 Atl. 108; *Chase v. Lincoln,* 3 Mass. 236. But it has never been doubted that the production of some of the subscribing witnesses was necessary if their presence in court could be secured. In the chancery courts of England it was held that all subscribing witnesses must be produced. As that was the only court which could by its decree establish a will, that doctrine has been held to be the common law of this country; and, except where modified by statute, the law is that all of the subscribing witnesses to a will must be produced unless the impossibility of producing them is made to appear. *Thornton's Ex'rs v. Thornton's Heirs, supra;* 1 Redfield, Wills, pp. 34–39.

The only statute of this state bearing upon this question is sec. 3788, which provides that, if no person shall appear to contest the probate of a will, the court may in its discretion grant probate thereof on the testimony of one of the subscribing witnesses only, and that if none of the subscribing witnesses shall reside in this state at the time fixed for proving the will, or if one or more of them shall have gone to parts unknown, and the court shall be satisfied that such witness, after due diligence used, cannot be found, it may, in its discretion, admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will and may admit proof of his handwriting and of the handwriting of the subscribing witness. This is the only modification of the common-law rule requiring all of the attesting witnesses to be called, to be found in the statutes of this state, and it is a clear recognition that the testimony of the attesting witnesses is indispensable to the establishment of a will if they can be produced at the hearing or trial.

This brings us to the question whether a mere bystander is a competent witness to a will. In this case the subscribing witnesses, including *Mrs. Hahn,* testified at the trial upon the question whether the writing propounded was in fact testator's will. Two or three bystanders also testified that

they were present at the time the will was signed, and testified to a number, if not all, of the facts required by statute for the legal execution of a will. Now it is said that these bystanders constituted competent witnesses to the will, by reason of which fact there were two other competent witnesses to the will besides *Mrs. Hahn,* satisfying the calls of sec. 2284, so that the bequest to her does not fail. When the will was propounded for probate a contest was interposed. It could not be admitted upon the testimony of one of the subscribing witnesses. If one only were produced the will must be denied probate. The question immediately confronting the proponents of the will was the production of the subscribing witnesses or a showing that they could not be produced. As a matter of fact they were both produced and both testified. But supposing they had not testified? Could the testimony of these bystanders have been introduced? Universal authority answers the question in the negative. Their testimony would constitute what the courts call secondary evidence of the fact of execution, and could be introduced only upon a showing that the primary evidence could not be produced. Under the circumstances, therefore, their testimony was incompetent and inadmissible, and they were not competent witnesses to show the fact of a valid execution of the will. The conclusion seems irresistible that these bystanders were not witnesses to the will, much less were they competent witnesses. They witnessed a mere transaction. To become what in common parlance as well as law is known and understood as a witness to the will required their identification therewith by the subscribing of their names thereto. While they may have been able to testify to the fact that the testator signed this document under certain circumstances and in a certain manner, that in nowise identified them with the will so that they may be said to be witnesses to the same.

But it is asked, What was the purpose of the legislature

in dropping out the word "subscribing" in its amendment of sec. 2284, Stats., by ch. 128, Laws 1905? One very good answer to this inquiry is that the legislature undoubtedly considered it mere surplusage, which in fact it was, because under the law existing at that time a competent witness to a will must have been a subscribing witness. It is by no means unusual for the statute to use the mere term "witness" to a will when it is plain it means a "subscribing witness" to the will. That is evident from the last part of sec. 2284, which was unaffected by the amendment of 1905, providing: "but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being competent witnesses to his will." Who will doubt that the words "competent witness" as there used, both before and after the amendment, meant a subscribing witness? When the word "subscribing" was dropped out of the preceding similar expression in the first part of the section it harmonized with the expression used in the last part of the section. Another instance of where the legislature refers to the subscribing witness to a will by the use of the mere term "witness" is sec. 3292. As a matter of fact, not only statutes but text-writers and judges commonly refer to the subscribing witnesses to a will as "witnesses."

But whether we are correct in our assumption that the legislature dropped out the word "subscribing" because it was mere surplusage, we cannot ascribe to the legislature a purpose of working such a radical change in the law as would result from the construction contended for by appellant. In the first place, the inquiry suggests itself, how, and by whom, and when is it to be determined whether a mere bystander is in fact a witness to a will? Is he a witness to a will because, perchance, he sees a testator sign his will and no more? Is he a witness to a will because he hears the testator declare the document to be his will and request the witnesses to sign the same, but does not see them sign? Is

he a witness to a will if he sees one of the attesting witnesses sign, but sees no more? In order to constitute him a witness to a will, must he be able to testify to all the facts showing a legal execution of the will? And if so, when, and where, and how is his status in such respect to be established? It will ofttimes happen that there will be no occasion for his giving his testimony in court, as where there is no contest, unless, forsooth, this amendment be held to operate to do away with the necessity of producing attesting witnesses to the will upon the probate thereof. Unless his testimony be given sometime during the course of the proceeding upon issues raised or some legitimate subject of inquiry, how is the court to tell whether he was a witness to the will or not? Is the witness at sometime to submit to a moot interrogation and cross-examination to enable the court to say whether he was in fact a witness to the will? Of course if he is to be held competent to take the place of a subscribing witness upon the hearing for the probate thereof, then it may be adjudged from his testimony so given; but is it to be held that the legislature contemplated such a radical change in the law by such inconspicuous action? Did the legislature intend, by the mere dropping out of the word "subscribing" in sec. 2284, to obviate the necessity of calling subscribing witnesses to establish the will, and thus do away with a principle firmly intrenched in the common law and tacitly recognized by the statutes of this state above quoted? The presumption in construing statutes is against any radical change of legislative policy. It is presumed that there is no intention to depart from any established policy of the law; to innovate upon fundamental principles. 2 Lewis's Sutherland, Stat. Constr. (2d ed.) p. 931, § 499.

The amendment by which the word "subscribing" was dropped out of sec. 2284 made two changes in that section. It disqualified the wife or the husband of a subscribing witness, in addition to the witness himself, from taking

under the will. It also omitted the term "subscribing." If the omission of that word is to have the effect for which appellant contends, it was by far the more important of the two changes and worked a more radical change in the existing law. Nevertheless, the title to the bill resulting in ch. 128, Laws 1905, made no mention of this feature of the bill. It was entitled: "An act amending sections 2284 and 2285 of the statutes of 1898 and making valid wills containing beneficial provisions in favor of husband or wife of a subscribing witness by making such provisions void." Not a word as to qualifying bystanders; not a word as to constituting mere bystanders witnesses to a will; and not a word as to obviating the necessity of producing subscribing witnesses to establish the will. We cannot think the legislature had in mind any such sweeping change or innovation. Had such been its purpose it certainly would have dignified it by some mention of it in the title to the act.

Upon these considerations we cannot impute to the legislature the purpose suggested by the appellant. We do not think it was the intention to change the law with reference to the probate of wills or the competency of witnesses in the least. We do not think it was the intention to designate as witnesses to a will a class of persons who had never before been so regarded since wills were required to be subscribed by attesting witnesses.

A case very similar to this arose in Iowa (*Will of Boyeus*, 23 Iowa, 354), where the same conclusion was reached.

By the Court.—Judgment affirmed.

ROSENBERRY, J., dissents.

The following opinion was filed June 14, 1921:

ESCHWEILER, J. (*dissenting*). "All men are liars" sang King David; he said it in haste but permitted it to stand.

Nevertheless even under the old Hebrew law that one was financially interested in the result of a lawsuit did not, apparently, prevent his being sworn and giving testimony. Michaelis, Laws of Moses, vol. IV, p. 345, quoting the apostrophe to the man to be honored from Psalm 15, "He that sweareth to his own hurt, and changeth not."

Centuries afterwards and as early as the seventeenth century (1 Wigmore, Evidence, § 575), and at the time when juries first began to consider information as to the issues other than that which they themselves possessed as dwellers in the same neighborhood, this expression of the Hebrew poet was apparently crystallized into the common-law rule of evidence to the effect that a person financially interested in the issue of a lawsuit was unworthy of belief and therefore an *incompetent* witness.

This common-law rule excluding as incompetent any interested person, whether a party or a mere witness, was to a great extent adopted as part of the law of this state. This rule, however, has been slowly relaxed by legislative enactments. *Estate of Johnson,* 170 Wis. 436 (175 N. W. 917), at p. 450. The only basis suggested for such statutes as are here involved, under which a person situated as is the appellant *Mrs. Hahn* can have objection raised as to her legal capacity to testify concerning the execution of or her right to take under a will, is this old common-law rule excluding as incompetent and unworthy of belief a person having a financial interest in the matter involved. *Will of Lyon,* 96 Wis. 339, 340, 71 N. W. 362; *Will of Hoppe,* 102 Wis. 54, 55, 78 N. W. 183.

It may safely be asserted that all the changes, either by statute or judicial decision, from territorial days to the time of the present decision, on the subject of the admissibility of the evidence of one interested in the result, have been in the direction of relaxing and modifying this old common-law rule and permitting such matters to go to the credibility

rather than to the admissibility of such evidence. Whether because mankind is slowly growing less prone to lie or more skilful in sifting the wheat from the chaff, it is, fortunately, not necessary to here express an opinion. The fact remains of the steady march, by statute and judicial decisions, in the one direction.

It is held in substance by the majority opinion that the omission by ch. 128, Laws 1905, of the word *"subscribing"* in the phrase "shall be wholly void unless there be two other competent *subscribing* witnesses" as it appeared in sec. 2284, Stats., prior to that amendment, was either done inadvertently or because deemed surplusage, or in any event that such omission was not a sufficient declaration of legislative intent to make a substantial change in the law on this point. I cannot concur in any such backhanded compliment to the mental processes of the legislature in this particular instance and for the following among other reasons:

There is a substantial difference between one who is a *competent* witness to the transaction involved in the making of a last will and one who is a *competent subscribing* witness to the same. By the very language of the statute as it stood and now stands and from the very nature of things, no one can properly be a *subscribing* witness to such a document who is not also a *competent* witness. But by no means does it follow that one who is a *competent* witness is necessarily only the one who also meets the definition of *competent subscribing* witness. The term *"competent witness"* describes the genus, the term *"competent subscribing* witness" defines the species; the former is the large circle, the latter the smaller and inclosed circle. That these two circles may often, from the very nature of the transaction involved, coincide, so far as contained numbers is concerned, can be readily seen, but that fortuitous coincidence is of no real weight in determining the question here presented.

If a testator desire to have his will admitted to probate

and his wishes therein expressed carried out, he must at the time of signing it, from the field of competent witnesses then present, call two at least of such *competent* witnesses to subscribe their names to such document in his presence and in the presence of each other. Such selection of such particular competent witnesses in nowise creates their competency or lessens the competency of other witnesses equally well qualified in law to testify as to the transaction. They must be *competent* witnesses or they cannot be *competent subscribing* witnesses; therefore their competency must exist before and at the time they subscribe; it is neither the gift nor the creation of the testator; it is an attribute of the witness alone.

I think the distinction was clearly recognized by one who surely had a familiarity with the subject and especially in this state, in the expression by the late Mr. Chief Justice CASSODAY in his work on Wills, sec. 210:

"Although other persons besides those who subscribe to the will as witnesses *may be competent* to testify as to its execution, yet it should be remembered that *subscribing* witnesses have a special importance in all controversies over the execution of wills."

In the state of Pennsylvania, for instance, from an early date and apparently up to the present moment, it has been held under a statute on this subject containing the following language: "shall be proved by the oaths or affirmations of two or more competent witnesses," that such *competent* witnesses need not be *subscribing* witnesses. *Frew v. Clarke,* 80 Pa. St. 170, 179, decided as early as 1833. It was also therein declared that although one such competent witness was the sole beneficiary and to a legacy of $75,000, his testimony was properly received.

In *McClure v. Redman,* 263 Pa. St. 405, 107 Atl. 25, decided in 1919, the existence of the doctrine was clearly recognized, and it was further held that, even with the provision requiring *two* or more witnesses, the requirement

may be met by circumstantial proof, one witness alone being present at the time of the execution of the will.

Manifestly, in the state of Pennsylvania at least, the use of the term "a witness to a will" would not imply that such witness was a subscribing witness, although much stress is laid in the majority opinion upon what is assumed to be the meaning of the term. It might be noted in passing, as to conveyances, that signing of witnesses is not essential to qualify one to testify as to facts showing the passing of title; such formality of subscription is only necessary in order that the instrument may be recorded. *Leinenkugel v. Kehl,* 73 Wis. 238, 40 N. W. 683; *Eadie v. Chambers,* 172 Fed. 73, 24 L. R. A. N. S. 879, and note.

The making of a last will and testament, which is defined by Blackstone as "the legal declaration of a man's intention, which he wills to be performed after his death," is his act and one thing; the statutory formalities which are necessary in order to permit the court having proper jurisdiction to administer the property under such declaration is another and separate thing and subject entirely to legislative control.

This court has gone as far as any court in the land in declaring the substantial nature of the right existing in the living to make disposition of his property after death and that it is of such a nature that it cannot be taken away by the legislature. *Nunnemacher v. State,* 129 Wis. 190, 202, 108 N. W. 627.

The solemn duty resting upon the courts in this state to effectuate the testator's lawfully expressed wishes irrespective of the desires of those remembered or unremembered in the document has been repeated so often as to become trite. *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Will of Rice,* 150 Wis. 401, 405, 136 N. W. 956, 137 N. W. 778; *Will of Ball,* 153 Wis. 27, 141 N. W. 8; *Will of Duncan,* 154 Wis. 39, 48, 141 N. W. 1002; *Schoenwetter v. Schoenwetter,* 164 Wis. 131, 135, 159 N. W. 737; *Estate of Staab,* 166 Wis. 587, 590, 166 N. W. 326.

It has been declared by the former decisions in this matter that that which was presented as the last will of Theodore W. Johnson was his last will. The intention so declared in that document is now frustrated on the theory that the legislature did not sufficiently express an intention to change the statutory regulation of the formalities surrounding the execution of such a document to now permit the intention of the deceased to be carried out. I can see no substantial reason why a legislative intent to change is not clearly expressed by the change made in the statute by ch. 128, Laws 1905.

For convenience of comparison, that statute before and after the amendment is again here presented:

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a *subscribing* witness thereto, shall be wholly void unless there be two other *competent subscribing* witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being *competent* witnesses to his will."

"All beneficial devises, legacies and gifts whatsoever, made or given in any will to a *subscribing* witness thereto, (or to the husband or wife of a *subscribing* witness thereto), shall be wholly void unless there be two other *competent* . . . witnesses to the same; but a mere charge on the lands of the devisor for the payment of debts shall not prevent his creditors from being *competent* witnesses to his will."

It is significant that the word "subscribing" as limiting the term "competent witness" appears twice in the statute before amendment; by the amendment it is stricken out once and again specifically inserted, so that the net result, the descriptive term "*subscribing* witness," stares one in the face as prominently and as often after the amendment as before. If, as suggested in the majority opinion, the term was considered surplusage in the phrase where it was omitted, the legislative mind evidently did not consider it surplusage in the clause in which it was left in the old statute and in the

new clause inserted. From the context it had exactly the same significance—no more, no less—in the phrase in which it was omitted, in the phrase in which it was left, and in the phrase in which it was inserted. To suggest that the legislature had surplusage in their minds in amending this statute and were aiming at brevity of expression only in so omitting it can hardly be considered, to say the least, as flattering to that body. If it was their purpose to merely shorten the statute by such process, that purpose fell stillborn.

No question can be raised but that, if the legislature had in so many words declared that they did intend that a gift should be held valid to one, a competent witness to the transaction involved in the making of a will, and who, at the request of the very testator, also subscribed the same to comply with legislative will, where there were others present just as conversant with what was said and done and whose testimony is available, the court would be bound to so hold. I can see no tremendous upheaval in the law of wills if such a conclusion were now upheld.

As yet neither constitution, statute, nor custom requires that the legislature should give any reasons for their amendments to existing statutes or their passage of new ones. No solemn declaration on their part is required as an explanation of changes made, for such, if given, might but add to the judicial labors.

If we view this question with the not unreasonable assumption that as a foundation of the legislative intent expressed in this amendment there was embodied the thought, as expressed by the late Mr. Chief Justice CASSODAY, *supra,* and which is recognized as the rule elsewhere, that others than subscribing witnesses could be competent witnesses to testify in a court of justice as to the essential facts concerning what a testator said and did, and further that the legislative mind had become imbued with the lofty and often expressed declarations of this court as to the sanctity to be

accorded the wish of a testator, and also wanted to still further encroach upon the old common-law fear of want of credibility in the testimony of interested persons, I can see no more simple and direct way to accomplish such purposes, which are so well and so entirely within the legislative field, than providing, as I think they have done, that when others than a beneficiary who were present at the time of the execution of the will are competent, that is not disqualified by law, and they do testify to sufficient facts to support the will, the wish of the testator and the gift to the beneficiary, although a subscribing witness, should both prevail. That there was no fanfare or flourish of legislative trumpets so declaring is not sufficient, in my view of it, to work what seems to me to be a judicial veto interposed by the majority opinion.

Weight is attached in the majority opinion to the fact that the subscribing witnesses to such a document are required, in case of contest, to be first called and their testimony given or their absence satisfactorily explained. This is entirely a matter of order of proof and has no bearing whatever upon the question of the competency of the witnesses. A person who participates in the making of a contract reduced to writing is no less a competent witness to the transaction because the rules of evidence provide that the document itself is the best evidence and must be first produced or its absence explained before oral testimony is taken as to its contents. The competency of such a witness is not at all dependent upon the production or nonproduction of the document. The same should be held in the instant situation. The mere fact that A. and B. are by certain rules of evidence required to be called as witnesses before C. can be permitted to testify has absolutely no bearing upon the question of the competency of C. under the other and independent rules of evidence. No authority is cited to the effect that a test of competency of a witness is to be determined upon a rule which relates solely to the order of proof or of first or

secondary evidence. The competency of a witness does not rest in some twilight zone dependent upon the question as to whether some document or some other witness shall be first produced or sworn.

A mere glance at the statutes and decisions of the different state jurisdictions shows that the requirements of formalities requisite for the probate of a will are as varied as the jurisdictions, and there are none in which such formalities are not constantly changed and without any formidable preambles in the amending statutes either. What is meat in one jurisdiction is poison in another.

In New York two attesting witnesses are required, each of whom shall sign his name as a witness at the end of the will at the request of the testator. They both, however, do not need to be present at the time of signing. *Hoysradt v. Kingman,* 22 N. Y. 372, 379.

In California, under a substantially similar statute, it was held that they must both be present. *Estate of Emart,* 175 Cal. 238, 165 Pac. 707, L. R. A. 1917F, 866.

Under our present statute, sec. 2282, the signing by the witnesses must be done when both are present. *Will of Griffith,* 165 Wis. 601, 608, 163 N. W. 138. Formerly under the same statute before amendment such subscribing in the presence of both witnesses was not required. *Will of Smith,* 52 Wis. 543, 547, 8 N. W. 616, 9 N. W. 665.

A substantial difference was recognized at common law and for a long period in many of the states of this country as to wills regarding real property and those regarding personal property, the latter not requiring the same formality as the former. A will that would be void as to real estate for want of proper execution might nevertheless be valid as to personal property. *Lake v. Warner,* 34 Conn. 483; *Ex parte Henry,* 24 Ala. 638. The property here involved is substantially all personalty.

Many states expressly provide that a holographic will, that is one written and signed in the proper handwriting of a testator (some requiring that it shall be dated also), shall be valid though not attested or subscribed by a single witness. Rood, Wills, § 268. Such holographic will, valid in France, made by a citizen of Maryland sojourning in France, covering both real and personal property in Maryland, was properly admitted and administered in Maryland. *Lindsay v. Wilson,* 103 Md. 252, 63 Atl. 566, 2 L. R. A. N. S. 408, and note.

Undoubtedly the courts in this state would have to hold the same as to such foreign wills under sec. 2283, Stats., providing for recognition of wills executed outside of this state under the there required formalities, conditioned only that it be in writing and subscribed by testator. The provision for subscribing witnesses is here conspicuous by its absence.

In *Children's Aid Society v. Loveridge,* 70 N. Y. 387, it was held that an executor to a will may nevertheless be a competent subscribing witness under a statute quite similar to the one before us. It would appear furthermore from the language of the decision in that case that other than subscribing witnesses who were present at its execution were sworn upon the hearing just as in the case at bar and their testimony in effect held admissible and sufficient to sustain the will. Page 392.

In *Rugg v. Rugg,* 83 N. Y. 592, 594, the testimony of the two subscribing witnesses created a doubt as to some of the facts essential to be shown for a proper execution of a will. To supply this defect the executor was held to be a competent witness to testify to the essential features so left in doubt and the will held properly executed. The probate of a will should not be rejected because one of the subscribing witnesses testifies in contradiction to the other and against

the document. *Will of Grant,* 149 Wis. 330, 337, 135 N. W. 833; *Matter of Spooner,* 13 Mills' Reports (N. Y. Sur.) 482.

These points are dwelt upon merely as indicating the vast variety of legislative and judicial views on the subject of statutory formalities, their flexibility and the constant changes made; that no property rights are considered as invaded or the established order of things overthrown by such changes.

I think the judgment should be reversed and it be held that *Mrs. Hahn,* as designated beneficiary in the admitted will of Theodore W. Johnson, is entitled to take just as the testator therein declared she should take.

DOERFLER, J., took no part.

A motion for a rehearing was denied, with $25 costs, on September 23, 1921.

SCHOEN, Appellant, vs. SCHOEN, Respondent.

April 9—September 23, 1921.

Divorce: Grounds: Cruel and inhuman treatment: How accomplished: Wife employing means other than personal violence: Loss of temper by husband: Effect on husband's action: Evidence: Sufficiency: Division of property: Amount awarded wife.

1. In an action by the wife for a divorce, the evidence is *held* to show that she had been guilty of a course of cruel and inhuman treatment of the husband practiced by means other than personal violence, through manifesting hatred toward him, through interference in his business, through placing her financial differences with her husband in the hands of an attorney, by employing various methods of coercion, if not blackmail, in attempting to secure a financial settlement, and by persistently worrying and harassing the husband.
2. The evidence is also *held* insufficient to show that the husband had been guilty of such cruel and inhuman treatment as to entitle the wife to a divorce or such as to forfeit his own right

to a divorce from her, although it appears that at times, because of the attitude of the wife, he lost control of his temper and behaved in a manner inconsistent with the relations of husband and wife, as on the whole he appears to have exercised self-restraint and to have been willing to do all that reasonably might have been expected of him to restore peaceful relations.

3. Where the husband had secured an absolute decree because of cruel and inhuman treatment, the evidence is *held* to justify the application by the trial court of the rule that under ordinary circumstances one third of the property of the parties will be awarded to the wife.

APPEAL from a judgment of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

Action for divorce. Plaintiff and defendant were married in the state of New York on November 2, 1884. At the time of trial plaintiff was sixty-two years of age and the defendant fifty-nine years of age. Two children, Hortense, aged twenty-nine, and Edgar, aged twenty-six, were the living issue of said marriage.

The defendant is a man of considerable business energy and has had a varied business career. Prior to 1898 he had been in various businesses in different parts of the country. During that year he removed from San Francisco to Chicago in straitened circumstances. He obtained a position with Siegel & Bros. at $25 a week.

Mrs. Schoen had considerable talent as a designer of styles, and at *Schoen's* instigation she designed and manufactured some petticoats for Siegel & Bros. The latter were satisfied with her work and *Schoen* later rented a factory in Chicago and turned out a considerable volume of petticoats for Siegel Bros. During this time he continued his position with Siegel Bros., and *Mrs. Schoen* devoted practically all of her time to the factory. Sometime thereafter, at the instance of Siegel Bros., *Schoen* rented a factory for the manufacture of petticoats at Racine. Siegel Bros. purchased the equipment for the Racine factory, but by some mistake on the part of the credit man, instead of buying the

equipment in the name of Siegel Bros. it was bought in the name of *Schoen,* and *Schoen* was charged with the amount thereof on the books of Siegel Bros. This factory did a considerable business and transformed a large volume of goods for Siegel Bros. With a change of management of the department of Siegel Bros. with which *Schoen* was doing business came a disposition to cut down the volume of orders for business given to *Schoen's* factory. This was on the theory that Siegel Bros. owned the factory or the equipment. The circumstance gave rise to the question whether Siegel Bros. or *Schoen* owned the equipment, at which time the mistake on the part of the credit man was discovered, and it seemed to be conceded that *Schoen* had legal title to the equipment, and Siegel Bros. were influenced to continue giving orders to *Schoen* to enable him to pay off his indebtedness to the company. However, the balance then due was converted into notes signed by *Mrs. Schoen.* This seems to have been for the reason that *Schoen* was involved financially and did not want the title to this equipment. Later, in bankruptcy proceedings, he swore that *Mrs. Schoen* owned the business and equipment. While the business was at first carried on in the name of the Schoen Manufacturing Company, it was at about the time of the giving of these notes changed to *Rosa Schoen,* doing business as the Schoen Manufacturing Company.

Mrs. Schoen worked very hard in this factory, giving much of her personal attention to the management thereof and to the designing of styles, while *Schoen* continued in a higher salaried position with Siegel Bros., although he at all times exercised a sort of advisory supervision over the business. He lived in Chicago during this time, but went to Racine on the one o'clock train on Saturday, returning on the six o'clock train Sunday evening. During this time he was very busy about the business and always figured up the payrolls.

This business was continued in Racine until 1902 or 1903, when the defendant's health became impaired and he was obliged to go West because of such ill-health. He took with him the accumulations of the Racine business, somewhere around $15,000, and went into the mercantile business in Denver. *Mrs. Schoen* lived in Chicago and *Mr. Schoen* sent her $200 every month for living expenses. In a short time he became bankrupt. At the bankruptcy sale of his stock he purchased a portion thereof with money secured from a lawyer in Denver, took it to San Francisco, where he turned it over at a profit of $2,800. He then returned to Chicago with the $2,800, which was all the money they had. This was in 1906. He then organized the Paris Fashion Company in Milwaukee in association with one Max Friedlander. The capital stock of this company was $5,000. Friedlander put in $2,500 and *Schoen* put in $2,500. The capital stock consisted of 100 shares of $50 each. *Schoen* had forty-nine of the fifty shares, to which he was entitled by reason of his investment, placed in the name of his wife. This, it is claimed, was done because Moeller, the Denver lawyer who had advanced him the money to buy a portion of his bankrupt stock, claimed that *Schoen* had not paid him, and to embarrass Moeller in pressing his claim against *Schoen* he had the capital stock of the Paris Fashion Company issued in the name of his wife.

The business seemed to prosper, and about a year later *Schoen* bought out Friedlander, taking the shares thus purchased in his own name. He purchased a rather pretentious home, paying $1,500 down thereon, which was taken from the Paris Fashion Company. The title to this property was taken in the name of *Mrs. Schoen.*

In 1910 *Mrs. Schoen* spent the summer in California for her health. In the same year she, with her son Edgar, departed for Europe for a prolonged sojourn. As she was sailing from New York an incident occurred which has an

important bearing on subsequent events. Her daughter Hortense was married against the will and over the protest of *Mrs. Schoen* in 1910, although with the full knowledge and consent of *Mr. Schoen*. *Mrs. Schoen* became very bitter towards the daughter and had completely ostracized her. At the time she sailed for Europe the daughter was living in New York. *Mr. Schoen* accompanied *Mrs. Schoen* to New York and was instrumental in bringing about a meeting between *Mrs. Schoen* and the daughter in the hope that a reconciliation might result. The meeting was a rather pleasant one, and the daughter promised to be at the pier the next morning as *Mrs. Schoen* should take the boat, but for some reason she was unable to keep the appointment and *Mrs. Schoen* sailed without again seeing the daughter. It seems that this incident further embittered *Mrs. Schoen* towards the daughter.

A few months after *Mrs. Schoen* had reached Europe, and during the Jewish holidays, *Mr. Schoen* invited the daughter and her husband to his home in Milwaukee to spend the holidays. *Mrs. Schoen* heard of this and was still further embittered. From thence on she assumed towards *Mr. Schoen* an attitude of bitterness that was little short of hatred, as manifested by her written communications. When she heard that her daughter had spent the holidays with *Mr. Schoen* she wrote him a letter in which she stated:

"Now, *George,* I wish you and your daughter for whom you have sacrificed everything, a long life—all of you should get to be 100 years old and that I will beg God for it and hope you will get the good treatment that you will be looked after and you can live any way you want. How you will tell the Milwaukee people I am never coming back to America, that is up to you. I do not write to anybody. I wrote you all that I intend to do with Edgar and when he is through I will send him back to America. Every letter from now on that you will send I will without opening return to you as we two are through with each other and thank God a finish with terrors is better than terrors without a finish

and this is what I had for twenty-seven years and the last eight months were the same."

On October 5, 1912, she wrote him a letter acknowledging receipt of his cabled New Year's greetings, wondering why he sent them, and assuring him that he need not cable, saying:

"I think you and your daughter can go quietly to sleep, both of you with your good hearts now that you are again pured we will commence to make a finish of the whole affair. I wrote to lawyer Glicksman, but he wanted to know too much and I didn't care to tell him, and so I wrote to lawyer Cowen that on account of your sickness could he go deeply into the matter, but now that you are well, I will make a finish, as I will now make a home here for myself, because I like it here better and I will fix up a home. . . . I dictated a biography of my life and only the main things—the smaller affairs the reader will be able to think. This book I will send to your son-in-law, then he has the right to know everything, so I dictated it as if I would dictate it for him, especially as Mr. Levy, your brother-in-law, is again in your good graces. I did not send this book yet to the address, especially as long as your son-in-law in regard to what I asked, so I thought I rather send it to another address. I must send this book to a lawyer as when the man must have my case, he must be able to look behind the scenes. Now, I ask you, do you want anyone to read this book. Perhaps if you would read the book you would settle with me without trouble, and we would only need a lawyer to make this legal, because I am going to seek my rights—where and how I can without consideration, as you now said what one does, one must do altogether. Now one thing more in regard to your daughter. I do not know that person and I think you must have lost your senses, when you write to me about him or her, because they did everything so that I do not want to know about them, like it says 'An eye for an eye,' and I will not forget it in the hour of my death, that she made Jeanette her dear aunt."

In numerous ways she sought to interfere with the management of his business and did many things calculated to

embarrass and harass him in his business. She first demanded the discharge of Miss Bowers, the bookkeeper of the Paris Fashion Company, an old and faithful employee, and in the letter demanding the discharge she used this language:

"This letter will reach you in the middle of the week, and on the end of the week the end will come and *you* will go under by it. And even if I have to make my living as a nurse girl for children, I will be perfectly satisfied, because no one knows that I often ate my bread and butter, for which I had to pay with shame; so either Miss Bowers goes, or you and I go under as true as God shall help me. So I want the answer by cable whether the person is gone or not. And when she is gone, I want everything detailed as far as business is concerned; and if she doesn't go, the business will."

Her demand not having been acceded to, she later wrote as follows:

"If I say so she must go, well then I want to see whether she will or not. I discharged her by cable and at the same time I wrote my lawyer that he sees whether or not this person is still there. I will write a letter to my lawyer to demand the discharge of this person and put it in such a light that it should look like it is a female employee, so it should look like a scandal and demand her discharge immediately."

There was in the employ of the Paris Fashion Company a man by the name of Kleeman. He was employed at *Mrs. Schoen's* own suggestion, and when *Mrs. Schoen* left for Europe Mr. and Mrs. Kleeman took up their abode in the *Schoen* home, with *Mrs. Schoen's* knowledge and consent. Suddenly *Mrs. Schoen* demanded that they leave the house at once, making her demand by cable, and after they had left the house, because Mrs. Kleeman did not write to her, she wrote Mrs. Kleeman a most insulting letter and spoke most contemptuously concerning the ability and worth of Mr. Kleeman.

In February, 1913, she inclosed in an envelope, addressed to *Mr. Schoen,* an unsigned power of attorney, constituting William D. Thompson, Esq., of Racine, Wisconsin, her attorney to adjust her affairs with *Mr. Schoen* and the Paris Fashion Company, and a letter saying:

"Shall I sign this original: Or will you be more satisfied to come to terms with me without this. Last year you had your mouth pretty full that you can always make a living for yourself, but this is all tomfoolery, only talk. You may get a place and work for $15 a week, but places for $4,000 a year do not lay on the street, especially when a man is your age and especially not when a man had a stroke of apoplexy, even though the stroke was very light. Your good friends should have sent you away for three months to Florida, but they are only good to amuse themselves with you for a few hours, but when it comes to spending money, then that is different. They may invite you for a meal for business reasons, but when the finish is there and you have lost all, then everything evaporates like the wind. But I got enough out of the furniture so that I can start up again and I can make a living for myself at any time. You must answer this by cable."

Later on she employed Mr. Thompson to procure a settlement of her financial matters with *Mr. Schoen* and the Paris Fashion Company. Protracted negotiations were had between Mr. Thompson and *Mr. Schoen,* but nothing resulted. At the trial Mr. Thompson testified that "during all of these negotiations as far as property matters were concerned, *Mr. Schoen* told me that he would be willing to concede almost anything, just to get peace of mind; in just practically those words, he would give her the whole business to have peace."

When *Mrs. Schoen* left for Europe she had a letter of credit for $1,000 and *Mr. Schoen* sent her regularly weekly remittances of $75. A few months before returning in 1913 she drew on him through his bank for $1,000. At that time *Mr. Schoen* had borrowed heavily from the bank and was in rather close financial circumstances. The draft

came without any warning and constituted an unexpected burden—a sudden emergency which caused *Mr. Schoen* great financial embarrassment. She returned from Europe in August, 1913. Upon her return to New York she called upon his principal creditors in that city, deplored his business capacity, declared that failure of his business was imminent, and warned against their extending him further credit. *Mr. Schoen* had gone to New York to meet her, but reflecting upon all that had occurred he feared that he might not be able to contain himself and that a scene might result if he met her at the boat. Accordingly he did not meet her, but his creditors informed him of her visit and the nature thereof. Naturally this affected him greatly. She came on to Milwaukee and went to their home. He returned to Milwaukee and took up his abode at a hotel, where he remained for a number of days. Finally mutual friends persuaded him to return to the home. This was sometime in August. From that time until the 6th day of September, 1913, she was demanding a settlement of financial matters between them. According to his testimony she gave him no rest day or night, until on September 6, 1913, a contract was entered into between them which provided that *George B. Schoen* should conduct the business of the Paris Fashion Company as economically as possible; that an annual inventory should be taken in the presence of *Rosa Schoen;* that a copy of the trial balance of the books of account should be given to *Rosa Schoen* each month; that no donation or charitable contributions should be made out of the funds of, or charged to, the company in excess of $100; that neither party will engage in any outside venture or speculation; that *George B. Schoen* should not expend more than $800 per year in trips to New York; that each party should draw from the company's funds $5,750 by way of services to the company. Out of the amount so drawn by each party each shall pay and contribute one half of the

expenses of their son Edgar's maintenance and education, the total of which shall not exceed $1,200 per year, one half of the premium on Edgar's life insurance policy, and one half of the interest charged on the mortgage standing against the real property owned by *Mrs. Rosa Schoen* known as No. 1706 State street, Milwaukee. *George B. Schoen* agreed to assign to *Rosa Schoen* life insurance policies aggregating $33,000. Such are the principal parts of the contract, although it is replete with details not necessary to be set forth here.

Matters then ran along, and in April, 1914, the home was sold and the proceeds thereof given to *Rosa Schoen,* who reinvested the same in other properties in Milwaukee. About this time the bank demanded a settlement of the Paris Fashion Company's indebtedness, and *Rosa Schoen* executed to the bank, as security for such indebtedness, mortgages on her property. After the sale of the home *Mr.* and *Mrs. Schoen* lived at the Hotel Martin. Things were not entirely agreeable between them during this time, but it is not deemed important to enter into detail concerning such matters.

On June 27, 1914, *Mrs. Schoen* went to Resthaven, in Waukesha. *Mr. Schoen* visited her there July 4th and left for New York July 5th. While he was in New York *Mrs. Schoen* called at the Paris Fashion Company store and countermanded an order and directed the return of some goods which had been received by the Paris Fashion Company from New York pursuant to an order given therefor by *Mr. Schoen,* and sent the following telegram to *Mr. Schoen,* who was then in New York: "Ordered goods returned so do not countermand my order if you do not want explanation to bank about management. Letter follows;" and three days later she sent a lettergram as follows:

"Before you go to store come to Waukesha. You left Thursday, Friday Mrs. Grossbaum came to Nugent. Terri-

ble fight with Fritzie before customers. Grossbaum had to take wife from store. Never returned that afternoon. The honest man also took charge of cash drawer. Says has you pat as ace."

Upon his return from New York *Mr. Schoen* called on her at Resthaven hotel and a very stormy interview resulted. In April, 1914, *Mrs. Schoen* bought tickets for Europe to sail August 3d for New York. During the latter part of July *Mrs. Schoen* started for New York preparatory for sailing. She stopped at Winnetka, Illinois, to visit her daughter, with whom she was then reconciled. While there she was informed that no boats would sail because of the breaking out of the war. She called *Mr. Schoen* on the telephone. The character of this telephone communication is in dispute, but either *Mr. Schoen* told her it was none of his business what she did, or she told him it was none of his business what she did. Any way *Mrs. Schoen* returned to Wisconsin, spent a number of weeks at the Dells, some further time in Madison, and went to the Moore baths in Waukesha. While at the Moore baths she purchased a lot in Waukesha and built a cottage thereon. *Mr. Schoen* knew nothing of her whereabouts until sometime in December, when she called him on the telephone and asked permission to take some furniture from the storage warehouse for the use of her cottage. Her cottage was ready for occupancy by Christmas. Thereafter this cause of action was commenced.

The first three causes of action set forth in the complaint involve property rights and transactions between the parties, the nature of which it is unnecessary to set forth. The fourth cause of action is for a divorce from bed and board. Defendant answered the several causes of action set forth in the complaint and counterclaimed for an absolute divorce.

The case was tried before the court, and findings were

made and filed in which it was set forth that all the property or property rights owned by the plaintiff and sought to be enforced in her several causes of action were derived, directly or indirectly, from the defendant, and that she had neither property nor property rights constituting her separate estate. The court denied a divorce upon plaintiff's cause of action, but granted to the defendant an absolute divorce, and allowed to the plaintiff as a final distribution an amount equal to about one third of the property owned by both plaintiff and defendant. From that judgment plaintiff brings this appeal.

For the appellant there was a brief by *Lines, Spooner & Quarles,* and oral argument by *Willet M. Spooner* and *Howard A. Hartman,* all of Milwaukee.

Christian Doerfler and *Charles Friend,* both of Milwaukee, for the respondent.

The following opinion was filed July 13, 1921:

OWEN, J. The questions raised upon this appeal are almost entirely questions of fact. The record is voluminous, the printed case containing approximately 1,500 pages. Anything like a complete review of the evidence would prolong this opinion to an inordinate length. In fact the judgment well might be affirmed without an opinion. The contest, however, has been a stubborn one from the beginning. The plaintiff has experienced great difficulty in having the case prepared for presentation to this court, the time for the preparation and service of the printed case having been substantially extended. She has incurred great expense, and to affirm the judgment without an opinion might be regarded as too summary a disposition of a case which consumed the time of the trial court for upwards of seven weeks, and which has been presented to this court with great diligence and labor on the part of the attorneys.

The first question to consider is whether the court correctly determined the divorce issue. The material finding upon this issue is as follows:

"That for several years prior to the 1st day of August, 1914, and since about the year 1911, the plaintiff became, and was, guilty of a course of cruel and inhuman treatment of and towards the defendant *Schoen,* practiced by her by means other than personal violence; that she manifested a feeling of intense and groundless hatred and contempt and a vindictive, unforgiving, and unrelenting disposition towards him; that her conduct was such as to evince a persistent wantonness and a determination and design to deliberately and constantly worry and harass him and to keep him in a state of fear and anxiety over his business affairs, which, during a considerable part of said period, were in precarious financial condition, and to keep him in a state of apprehension lest she would undermine and destroy his character and social standing; that in pursuance of such determination and design she continually threatened him with exposures that would effect his financial embarrassment and ruin, and unjustifiably accused him of gross neglect and dishonesty in his business affairs; that she frequently interfered in his conduct of his business by discharging employees contrary to his wishes and without his consent, by interfering with his purchases and sales of goods and by derisively criticising his business ability and methods; that such interference in his business was carried on in a manner that had a tendency to destroy the discipline of his employees and to degrade and humiliate him before them."

We think this finding is abundantly sustained by the documentary and undisputed evidence in the case. No marital difficulties had arisen between the parties to this action prior to *Mrs. Schoen's* departure for Europe. Up to that time the marital relations were entirely pleasant. *Mr. Schoen* accompanied her to the pier in New York, saw her safely aboard the vessel, provided her with a letter of credit for $1,000, and regularly remitted $75 per week. The only family disturbance that had occurred prior to that time arose because of the marriage of the daughter Hortense

without the knowledge or consent of the mother. An estrangement existed by reason thereof between the mother and daughter, and *Mr. Schoen* most earnestly desired a reconciliation. He performed his best offices to bring about such reconciliation before *Mrs. Schoen* departed for Europe, but such successes as he was able to obtain in that respect were entirely neutralized by the failure of the daughter to meet *Mrs. Schoen* at the pier on the morning of her departure. By reason of this failure the feelings of the mother were intensified, if such were possible, and she set foot on European soil entertaining the bitterest animosity towards her offspring. *Mr. Schoen* did not share in this animosity. In fact it is certain that because of its existence on the part of *Mrs. Schoen* he was much depressed in spirits, and the incident caused him great grief. In response to most natural paternal instincts, he invited the daughter and her husband to spend the holidays with him in Milwaukee. This was evidently construed by *Mrs. Schoen* as a mortal affront, and she became imbued with the same vindictive animosity towards her husband that she then cherished towards her daughter. She immediately assumed an attitude of hostility and ill-concealed hatred towards her husband, which was manifested in many ways.

First of all, it stands undisputed that she placed her financial affairs with her husband in the hands of an attorney. This in itself is a serious shock to one's ideals of proper marital relations, and we suggest that whether the employment of an attorney by one spouse to prosecute by legal means the enforcement of property rights against another does not evince an entire lack of that sympathy and love which should characterize the marital relations as a most appropriate subject for reflection. Without meaning to declare that it in itself constitutes cruel and inhuman treatment, such an incident certainly is quite inconsistent with marital duties and obligations. The marital relation carries with it a unity of interest and sympathy, the pleasure

and duty of mutual helpfulness, the sharing of burdens and sorrows, mutual sentiments and feelings entirely inconsistent with the waging of legal controversies between husband and wife. The institution of legal proceedings by one spouse against another for the enforcement of mere property rights or financial interests, if not provoked by unjust conduct on the part of the other, dangerously approximates the character of a cruel and inhuman act, not because of the purpose to enforce property rights, but because the enforcement thereof in such a manner indicates a lack of marital sympathy and love and constitutes a rude shock to the marital sensibilities and relations. Hostile legal proceedings between ordinary business partners usually result in a termination of the partnership. If such be the result concerning a mere business relation, it well may be questioned whether the much more personal and sacred relation of husband and wife can survive under such circumstances.

But assuming that such action may be taken on the part of one spouse towards the other in good faith and for justifiable purposes without disturbance of the marital relations or injury to conjugal sensibilities, such is not the case here. *Mrs. Schoen's* entire conduct towards the defendant while in Europe was one of open hatred and avowed contempt. She refused to open his letters. She told him that he need not send her birthday greetings. She interfered with the management of his business by demanding the discharge of a valued and trusted employee. She did this by letter and by cablegram. She threatened to write her autobiography which would bring shame and disgrace upon him. She demanded the expulsion of the Kleemans, whom she had invited to her home, from her house, to the great humiliation of her husband. She practiced various methods of coercion, if not blackmail.

"I will write a letter to my lawyer to demand the discharge of this person [Miss Bowers] and put it in such a light that

it should look like it is a female employee, so it should look like a scandal and demand her discharge immediately. I want that when this letter reaches you that Miss Bowers be discharged, otherwise I will get redress by writing to the bank." "Shall I sign this original [power of attorney] or will you be more satisfied to come to terms with me without this." "How you will tell the Milwaukee people I am never coming back to America, that is up to you." "Every letter from now on that you will send I will without opening return to you as we two are through with each other and thank God a finish with terrors is better than terrors without a finish." "Now one thing more in regard to your daughter. I do not know that person and I think you must have lost your senses, when you write to me about him or her, because they did everything so that I do not want to know about them, like it says 'An eye for an eye,' and I will not forget it in the hour of my death, that she made Jeanette her dear aunt." "I dictated a biography of my life and only the main things—the smaller affairs the reader will be able to think. This book I will send to your son-in-law, then he has the right to know everything, so I dictated it as if I would dictate it for him, especially as Mr. Levy, your brother-in-law, is again in your good graces. I must send this book to a lawyer as when the man must have my case, he must be able to look behind the scenes. Now, I ask you, do you want any one to read this book. Perhaps, if you should read the book you would settle with me without trouble and we would only need a lawyer to make this legal, because I am going to seek my rights—where and how I can without consideration."

Without warning she drew a draft upon him for $1,000 at a time when it caused him most serious embarrassment, and she drew it through the bank at which he was a large borrower. Her first act upon arrival on American soil was an attempt to ruin him with his principal creditor. Upon arrival at home she pestered him by day and by night until he purchased peace by signing the contract mentioned in the statement of facts. This contract itself goes very far towards an intentional severance on her part of their marriage relations.

Early in the following spring, after their home had been disposed of and she had appropriated the proceeds, she made her plans and purchased tickets for her return to Europe in August. The execution of those plans was frustrated by the outbreak of war, after which she pursued her own way without conference or communication with *Mr. Schoen* until the month of December, during which time she purchased a lot, built a cottage, and had it ready for occupancy in the city of Waukesha. She sent him a New Year's greeting consisting of a blank piece of paper. She addressed him a most contemptuous letter on the occasion of his birthday, in which she saluted him as the shrewdest and smartest merchandise man in the land. This letter was written July 17, 1914, just prior to her intended departure for Europe. March 11, 1915, she wrote a letter to Bonis & Company, New York, a large creditor of *Mr. Schoen,* deploring his business incapacity and warning it against further extension of credit. She approached John E. DeWolf, a financial backer of *Mr. Schoen* in Milwaukee, and expressed surprise that he should loan *Mr. Schoen* any money or extend him any credit.

A more consistent and persistent course of cruel and inhuman treatment can scarcely be imagined. It indicates a transition from marital love and sympathy to hatred and contempt. Every conjugal instinct is dead, and in the breast where love, sympathy, and a spirit of helpfulness once bloomed in beauty, hatred, contempt, and a disposition to destroy now thrive in ugliness.

It will be noted that in arriving at this conclusion we have confined ourselves to the record made by *Mrs. Schoen.* As may be inferred from the statement that the printed case contains 1,500 pages, there is much of charge and countercharge. There is much disputed testimony. Certain anonymous letters reflecting seriously upon *Mr. Schoen's* credit, addressed to his creditors, were received in evidence which

appellant strenuously contends should not have been received because of the failure of proof that they were written by *Mrs. Schoen.* No mention is made or consideration given to those letters. Neither is mention made nor consideration given to the disputed testimony in the case. The written record made by *Mrs. Schoen* is in our judgment abundantly sufficient to justify the finding of the court upon the issue of divorce.

It is urged by the appellant that the defendant was guilty of such cruel and inhuman treatment as to entitle the plaintiff to a divorce, and that at least his conduct was such as to forfeit his right to a divorce. The acts of misconduct on the part of defendant relied upon by plaintiff to constitute violations of his marital obligations are those occurring after the return of *Mrs. Schoen* from Europe. Reference has already been made to the fact that prior to *Mrs. Schoen's* departure for Europe the relations between plaintiff and defendant had been pleasant. It is true that *Mr. Schoen* had counseled and consented to the secret marriage of the daughter, knowing that this was in opposition to the desires of *Mrs. Schoen.* However, this incident created no rupture between *Mr.* and *Mrs. Schoen,* and there is no suggestion that the difficulties arising between them are attributable to that incident, even though it could be said that the consent of a father to the marriage of a child, opposed by the mother, affords the mother grounds for divorce.

It is first said that when negotiations were being pressed by Mr. Thompson, acting as attorney for *Mrs. Schoen,* certain propositions made by *Mr. Schoen* looking towards a settlement were conditioned on an absolute divorce, as indicating an intention and purpose on his part to bring about a severance of the marriage relation. It is true that during these negotiations the question of whether any arrangement entered into between the parties looking towards a settlement of their financial affairs would be permanent was discussed,

and Mr. Thompson told *Mr. Schoen* that it would not necessarily be permanent unless a divorce should be secured. Mr. Thompson admits that he told *Mr. Schoen* this, although there is disagreement between *Mr. Schoen* and Mr. Thompson as to who first suggested the necessity of getting the divorce in order to assure a final and definite settlement between them. However, to our minds this has little significance, because the conduct of *Mrs. Schoen* up to that time gave to the defendant a complete cause of action for divorce. In view of what had transpired it is little wonder that he had in mind the matter of procuring a divorce, and especially when advised by the attorney for the plaintiff that no arrangement entered into could be regarded as final and permanent as long as the marital relation continued.

Certain acts of unkindness on the part of defendant towards plaintiff occurring after her return from Europe are stressed in the brief of appellant as constituting cruel and inhuman treatment, and it is further stated that after the sale of the home on State street in April, 1914, defendant made no effort to procure another home. Although it appears in the record that defendant did have under consideration the purchase of a property on Grand avenue with a view of converting it into a homestead, and that *Mrs. Schoen* had expressed her satisfaction therewith, yet under all the circumstances the defendant was under no obligation to provide a further home. Even at that time *Mrs. Schoen* had purchased passage for Europe, intending to sail August 3d. She had manifested no particular interest in the purchase of another home and had not urged the matter upon the defendant. When she was prevented from following out her plans to sail, as intended, she had no further communication with the defendant, but proceeded to the erection of a cottage of her own in the city of Waukesha. The stormy interview at Resthaven hotel, upon defendant's return from New York, is dwelt upon as constituting an act of cruel and inhuman treatment. There is little doubt that defendant

demeaned himself in a violent manner upon that occasion, but the provocation therefor must not be overlooked. Plaintiff had most officiously intruded herself into the business affairs of the defendant, had countermanded his order for merchandise in New York, and had ordered goods returned that had been shipped pursuant to his direction. A threatening telegram had been sent to him in New York not to interfere with the countermand. He had been peremptorily ordered to visit Resthaven or the bank would be told about the management of the business. This was but a continuation of a systematic and meddlesome interference with his business affairs for a period of two years, and while his violent behavior at the time is not to be condoned, nevertheless it is not greatly to be wondered at. However, that did not affect the prior conduct of the plaintiff which abundantly constituted grounds for divorce on the part of the defendant.

From the commencement of hostilities on the part of *Mrs. Schoen, Mr. Schoen* evidenced a magnanimous and generous disposition. On August 15, 1912, he wrote her a letter, which was returned to him unopened, in pursuance of her declared policy not to receive or read any of his letters. In the letter he speaks of the unjust accusations made by *Mrs. Schoen,* states that he is working day and night to make a success of the business, and declares:

"Certainly if you carried out your idea to write to the lawyers, which I cannot stop you, why then it is possible that the success will disappear because no business can stand an open scandal whether justified or unjustified. But in this case no one will blame me and it is all the same whether you are right with your private opinion what comes, or whether you are wrong, but this should be no cause to ruin the business. But why go to a lawyer? I will give you advice. Come with Edgar back and when you come and land here you can go with him to Boston, live near Harvard, and you can travel from there to here and we can arrange three different ways of settling this matter: 1. I resign and give

everything to you. I will leave and always can work up in another place. All I want for myself in this case is $1,000 and you can have all the rest. 2. Everything remains as it is and you can draw $5,000 a year. 3. We can sell out the good will and leases and I believe I can get a pretty good sum out of the business and I am perfectly satisfied to give you two thirds and keep one third for myself in case everything is done in an honorable manner, but this cannot be done over night."

And Mr. Thompson, her attorney, testified that during his negotiations with *Mr. Schoen* he told him that he would be willing to "concede almost anything to get peace of mind; he would give her the whole business to have peace."

In the face of the vitriolic attitude of *Mrs. Schoen* during this period it is not surprising if at times the defendant lost control of his temper and behaved in a manner inconsistent with the relations existing between husband and wife. But on the whole it appears that he exercised great self-restraint and that he was willing to do all that might reasonably be expected of him to restore peaceful relations. A holding that his conduct constituted grounds of divorce on the part of plaintiff or operated to foreclose his right thereto would be unsupported by any consideration of justice.

The only remaining matter to be considered is the property rights of the parties. The court considered that the property owned by *Mrs. Schoen* was acquired from her husband and as such subject to distribution under the provisions of sec. 2364, Stats., which authorizes the court, upon decreeing the divorce, to "finally divide and distribute the estate, both real and personal, of the husband and so much of the estate of the wife as shall have been derived from the husband, between the parties." It is argued that the property to which *Mrs. Schoen* holds title constitutes her separate estate, and that it is not property derived from her husband. Her title thereto is traced to the Racine manufacturing busi-

ness. The facts concerning that business are set forth in the statement of facts and need not be repeated here. The defendant conceived and initiated that business. His wife rendered him most material assistance in the conduct thereof. It is true that, when the time for settlement with Siegel Bros. arrived, the notes were signed by *Mrs. Schoen* and the name of the business was changed from Schoen Manufacturing Company to *Rosa Schoen,* doing business as the Schoen Manufacturing Company. The relations of the parties to the business, however, remained the same. The defendant continued to dominate and direct it, and when the business was suspended *Schoen,* the defendant, took the money without any question on the part of the plaintiff and invested it in business in Denver. He took possession of the machinery and disposed of it as he saw fit. He sent *Mrs. Schoen* $200 a month for living expenses while in Chicago. The testimony given by the defendant in bankruptcy proceedings to the effect that his wife owned this property is not controlling in this action. It may be that as between defendant and his creditors she did own the property so that his creditors could not reach the same. The most that can be said is that the earnings of the Racine business were the result of their joint effort.

In *Pfingsten v. Pfingsten,* 164 Wis. 308 (159 N. W. 921), at page 315 this court, in discussing this statutory provision for a division of property upon a decree for divorce, says that the provision "rests, largely, upon the fact that, in many cases, the property possessed by the parties is the result of their joint efforts, so that, equitably, a part of it should go to each, not excluding the wife, necessarily, because of her fault being adultery. The division may be made according to the equities of the case, as regards the origin of the possessions, and the relations between the parties be completely ended as in case of a separation without any jurisdiction to award alimony."

The trial court took the view that everything was lost in Denver, and that is true. We, however, have gone back of Denver, and taken into consideration the manner in which this property was acquired at Racine, because of the claim on the part of appellant that respondent took her money to Denver and holds it as her trustee. Our conclusion is that the property owned by *Mrs. Schoen* was acquired from her husband and that it was properly taken into account in the final distribution made by the court. The trial court, in awarding *Mrs. Schoen* an amount equal to about one third of the total value of the property owned by plaintiff and defendant, but followed the rule well established in this court that, under ordinary circumstances, upon a final division of the property the wife should be awarded one third thereof.

By the Court.—Judgment affirmed.

DOERFLER, J., took no part.

A motion for a rehearing was denied, without costs, on September 23, 1921.

GLATZ, Appellant, vs. GENERAL ACCIDENT, FIRE & LIFE ASSURANCE CORPORATION, LTD., OF PERTH, SCOTLAND (Garnishee defendant), Respondent.

May 4—September 23, 1921.

Insurance: Contract one of indemnity: Right of insurer to defend action against insured: Bankruptcy of assured: Liability of insurer for judgment against assured.

1. Where an insurance company defended an action brought against an assured by reason of the death of a third person caused by the negligence of assured, and after judgment in the trial court dismissing plaintiff's action the assured was adjudicated a bankrupt, the insurance company was not liable for the amount of the judgment which was entered in plaintiff's favor on appeal to this court.

2. A policy insuring against loss by reason of the liability imposed upon assured because of injuries sustained by a third person in an automobile collision, but also providing that no action shall lie against the insurer unless it be brought by the assured for loss actually sustained and paid by him in money, is a contract of indemnity.
3. An insurance company insuring against such loss may lawfully participate in the defense of actions against the assured, though the policy provides that no action shall lie against it unless it be brought by the assured for loss actually sustained and paid in money; and its contract assuming such obligation to defend an action is binding and enforceable between the parties.
4. Under such a policy, the company's agreement to defend any action against the assured and pay the costs of the litigation, and its reservation of the right to settle claims or suits, is not an assumption by it of liability for any claim which may finally be established by judgment so as to waive the condition that no action can be maintained unless the assured has actually paid the loss.

ESCHWEILER and DOERFLER, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

The judgment rendered was in favor of the garnishee defendant and against the plaintiff.

The action was a garnishment in aid of execution brought by plaintiff, a judgment creditor of the principal defendant, against the garnishee, a liability insurance company, upon a policy by the terms of which plaintiff claims the garnishee became indebted to the principal defendant upon the entry of the judgment by which plaintiff became a creditor of the latter.

Cyprian Glatz, husband of the plaintiff, was killed February 9, 1917, in a collision between the motorcycle on which he was riding and the delivery truck of the principal defendant. At the time of the collision a liability insurance policy was in force whereby the garnishee defendant agreed to indemnify the assured (the principal defendant) against "loss by reason of the liability imposed by law" upon the principal defendant for liability in such accidents. The

garnishee defendant further agreed to defend actions brought against the assured to establish the liabilities covered by the policy and to pay the costs taxed in such actions against the assured. Clause E of the general conditions of the policy provided that no action should be brought upon the policy except by the assured to recover for loss actually sustained and paid in money in satisfaction of judgment after trial of the issue. Other clauses of the policy required notice to be given to the insurer of accidents and of claims and suits against the insured in respect thereto. Further provisions reserved to the insurer the right to control and conduct the defense of actions against the assured, forbade the assured to make voluntary settlements or to interfere with the conduct of the litigation, and compelled his co-operation and assistance in matters relating to the trial or settlement of actions.

Plaintiff commenced an action in the circuit court for Milwaukee county on April 6, 1917, against the principal defendant for damages arising out of the death of her husband, and on May 24, 1918, a special verdict favorable to the plaintiff was rendered by the jury. Plaintiff's motion for judgment on the verdict of the jury was denied by the trial court on July 8, 1918. The defendant's motion to change the jury's answer to the question of the special verdict relating to contributory negligence from "No" to "Yes" was granted, and the defendant on July 11, 1918, was given judgment on the verdict so changed.

On November 18, 1918, the principal defendant was adjudicated bankrupt in the United States district court for the Eastern district of Wisconsin. On April 6, 1919, the supreme court reversed the judgment entered for the defendant in the trial court, and remanded the cause with directions to enter judgment for the plaintiff as found by the jury. On May 6, 1919, judgment was entered for the plaintiff in

accordance with the mandate of this court in the sum of $4,872.30 damages and costs, and on June 4, 1919, judgment was entered in favor of the plaintiff for $281.50, supreme court costs. On June 25, 1919, the plaintiff filed her claim against the bankrupt estate of the principal defendant, the claim being based on the judgment heretofore entered.

The referee in bankruptcy rejected the plaintiff's claim upon the ground that the debt at the time of the filing of the petition in bankruptcy was an unliquidated tort claim which had not been reduced to judgment, and that the retroactive feature of the subsequent judgment was ineffective to make plaintiff's debt a provable claim. Upon appeal to the district court the ruling of the referee in bankruptcy was affirmed, the decision being rendered on February 2, 1920. Upon the commencement of plaintiff's action against the assured for damages arising out of the collision, the garnishee defendant elected to and did take full control of the defense of the action, both in the circuit court and on appeal to the supreme court. During the course of the proceedings in the bankruptcy court the garnishee defendant by its attorneys appeared of counsel for the trustee, filed briefs, and participated in oral arguments in opposition to the claims of plaintiff before the referee in bankruptcy and the judge of the district court.

The garnishee defendant made two offers of settlement directly to the plaintiff during the trial, and it is conceded that it was the general practice of the garnishee to pay damages directly to injured persons in cases where the assured was solvent. Upon the termination of the proceedings in federal court an execution was issued and this garnishment commenced against the garnishee in aid thereof.

This is an appeal from the judgment awarded, dismissing the garnishee action.

For the appellant there was a brief by *O. W. Kreutzer* and *J. D. Wickhem,* both of Milwaukee, and oral argument by *Mr. Wickhem.*

For the respondent there was a brief by *Lines, Spooner & Quarles* of Milwaukee, and oral argument by *Charles B. Quarles.*

The following opinion was filed May 31, 1921:

SIEBECKER, C. J. On this appeal the inquiry is presented: Is the insurance company indebted to the assured, the Kroeger Brothers, for the amount of the judgment plaintiff recovered against the assured? The ground of liability claimed by plaintiff is that the garnishee defendant, the accident insurance company, is indebted to the assured on its accident insurance policy, whereby it agreed to indemnify the assured against "loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries, including death at any time resulting therefrom, accidentally suffered . . . while this policy is in force by any person . . . by reason of the ownership, maintenance, or use . . . of any of the automobiles" described in the declaration. The insurance company in its policy also agreed "to defend in the name and on behalf of the assured any suits, even if groundless, brought against the assured to recover damages on account of such happenings as are provided" for in the policy, and "to pay . . . all costs taxed against the assured in any legal proceeding defended by the corporation [the insurance company], all interest accruing after entry of judgment upon such part thereof as shall not be in excess of said liability. . . ." This insurance is, among other things, subject to the conditions that the assured give the company notice of the accident embraced in the policy, of any claim on account thereof, and forward to the company any summons or other process served on him to enforce such claim. The company reserves the right to

settle any claim or suit. The policy stipulates, except as therein provided, that

"The assured shall not voluntarily assume any liability, settle any claim, or incur any expense except at his own cost, or interfere in any negotiation for settlement or legal proceeding without the consent of the corporation previously given in writing."

The trial court construed the policy to be one of indemnity upon the terms contained in the following conditions:

"E. No action shall lie against the corporation to recover for any loss under this policy, unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment after the trial of the issue. No such action shall lie to recover under any other agreement of the corporation herein contained unless brought by the assured himself to recover money actually expended by him. . . . It is understood and agreed that the corporation does not prejudice by this condition any defenses against such action that it may be entitled to make."

We are unable to conceive more explicit terms in which condition E could have been phrased to express the idea that no liability shall exist under the policy by the company to the assured until the assured has sustained a loss covered by the policy and has been paid by him in money, or for money expended by him under the policy. The terms of this condition clearly make the contract one of indemnity and must be so regarded within the decisions of this and other courts. *Eberlein v. Fidelity & D. Co.* 164 Wis. 242, 159 N. W. 553; *Stenbom v. Brown-Corliss E. Co.* 137 Wis. 564, 119 N. W. 308; *Wis. Z. Co. v. Fidelity & D. Co.* 162 Wis. 39, 155 N. W. 1081; *Allen v. Ætna L. Ins. Co.* 145 Fed. 881; *Connolly v. Bolster,* 187 Mass. 266, 72 N. E. 981.

That an insurance company as an interested party in the litigation may lawfully participate in the defense of actions against the assured in cases like this is recognized in the decisions of this court. See *Gelo v. Pfister & Vogel L.*

Co. 132 Wis. 575, 113 N. W. 69, and cases cited above. Since the insurance company has this legal right, its contract with the assured assuming the obligation specified in the policy to defend actions brought against the assured on claims embraced in it is binding and enforceable between the parties. It is contended by appellant that such agreement by the insurance company to defend any action against the assured on claims covered by the policy, to pay the costs of such litigation, and reserving the right to settle any such claim or suit and thus exclude the assured from having control of these matters, operates as an assumption by the company of the liability for any claim which may finally be established by judgment against the assured and thereby waives the condition of the policy that no action can be maintained on the policy until the assured has actually paid a loss thereunder in money. This claim is predicated on the grounds asserted in some courts in similar actions, such as *Sanders v. Frankfort M., A. & P. G. Ins. Co.* 72 N. H. 485, 57 Atl. 655; *Patterson v. Adan,* 119 Minn. 308, 137 N. W. 1112; *Davies v. Maryland C. Co.* 89 Wash. 571, 154 Pac. 1116, 155 Pac. 1035. An examination of these adjudications shows that they are not in harmony with the decisions on this subject in this court above cited and are at variance with the decisions on the subject in other courts. The reasoning of these cases does not persuade us that they should be followed, and we incline to adhere to what has been held in the decisions in this court on the subject.

It is considered that the circuit court properly held that the garnishee defendant is not indebted to the principal defendant, and that the garnishment action must be dismissed.

By the Court.—The judgment appealed from is affirmed.

The following opinion was filed July 13, 1921:

DOERFLER, J. I cannot agree with the opinion of the court in this case.

Paragraphs 2, C, and D of the policy give to the insurance company the absolute and exclusive right to defend and contest a cause of action and to make settlements.

When the personal-injury action is begun, and, under the provisions of the policy, the summons is transmitted to the insurance company, the company is confronted with two propositions, namely: first, to assume the defense of the action; second, to decline the defense of the action.

An insurance company can only participate in the prosecution or defense of an action in the event that it has an interest in the same, which interest can only spring from its liability under the policy. If it has no interest and nevertheless defends, then it is an intermeddler, is guilty of maintenance and of the illegal practice of the law; for in order to defend it must hire an attorney at law to represent it, and the act of the attorney becomes the act of the company, and thus the company would be involved in the illegal practice of the law.

Sec. 2586, Stats., explicitly defines who can practice law and the terms and conditions under which a person can be admitted to practice law.

Sec. 2587, Stats., provides for a penalty for the unlawful practice of the law.

A corporation does not come within the purview of the sections referred to, and therefore if it attempts, either directly or indirectly, to practice law, then it violates the provisions of said sections.

Therefore the situation presented is this: When the company assumes the defense, as it did in this case, it does so with the express understanding that it has an interest therein, and in assuming the defense it recognizes its liability, and when it recognizes its liability it binds itself.

On the other hand, if the company assumes the defense of the personal-injury action upon the theory that in the event of the insolvency of the defendant it is not obligated

to pay, then it is committing an illegal act, and this very act would estop it from claiming nonliability. A party cannot obtain advantage in a court by reason of his unlawful act.

This must not be construed to mean that an insurance company like the respondent cannot lawfully insert in an insurance policy a provision such as is contained in paragraph E of the policy. But it is intended, however, to make clear this essential proposition, namely, that when the insurance company assumes the exclusive control of and the defense of an action, then it is estopped under the law from taking advantage of the privileges of paragraph E upon the doctrine stated, that it cannot legally defend an action in which it has no interest.

As is said in *Patterson v. Adan,* 119 Minn. 308, 138 N. W. 282:

"Neither public policy nor legal principles can be invoked against the validity of these provisions, if they mean no more than an undertaking to contest an asserted claim against the assured, for which it is liable when established; but if, under the pretense of an insurance obligation, the company carried on litigation in the name of one who has neither voice nor interest therein, and which does not affect the company itself, because the assured is unwilling or unable to pay if plaintiff is awarded judgment, it would seem the company becomes an officious intermeddler. Public policy does not permit a litigant to so surrender control of his lawsuit to one who has no interest in the cause of action." *Mahr v. Forrestal,* 132 Minn. 336, 156 N. W. 668; *Davies v. Maryland C. Co.* 89 Wash. 571, 154 Pac. 1116, L. R. A. 1916D, 395.

The assured, in taking out a policy of this kind, has in mind the accomplishment of two purposes: first, the creation of a fund out of which a person injured through the involuntary negligence of the assured may be in a degree compensated for such injury; second, a protection to himself from liability under the policy on the happening of an injury. The former consideration is perhaps of greater importance

to the assured and the public than the latter. The public is interested to the extent of having due compensation paid to the injured, so that he may not become a burden or charge upon the community. Such a policy is also designed to inure not only to the benefit of the injured, but in many cases to the benefit of his immediate dependents in case the injury results in death.

It must also be conceded that the insured, in taking out a policy of this kind, has principally in mind that in the event of an accident it may be protected, to the extent of the insurance, from financial embarrassment. Under the opinion of the court the insured would be placed in a position where, in the event of an accident, if it is financially embarrassed and thus in a condition where it is in greatest need of protection, the company would be enabled to relieve itself from liability.

As a result of the majority decision in this case the insurance company can properly claim to have achieved the following:

1. It has been permitted to furnish counsel to defend an action under a policy in which it has no interest and under which it has disclaimed liability.

2. It has vexatiously intermeddled in litigation against public policy, under its assumed rights under a policy in which it has no interest and under which it has been permitted to disclaim liability.

3. It has defeated the main object and purpose of the insurance, which is to provide a fund out of which is to be compensated an injured person for injuries sustained by or through the negligence of the insured.

4. It has escaped liability to the insured during a period of the insured's financial stress, peril, and embarrassment, and at a time when the assured contemplated that the proceeds of the insurance policy would relieve it from such stress, peril, and embarrassment.

5. It has been permitted to do all this without the application on the part of the court of the doctrine of estoppel, designed expressly for the purpose of preventing the company from taking advantage of and profiting by its own wrong and its unlawful acts.

These considerations are also referred to in order to demonstrate that neither the insured nor the insurer could reasonably have had in mind a situation such as was raised in this case, and where, under the decision of the court, the insured would be left practically remediless and the insurer relieved from liability.

So that, in construing paragraph E of the policy, it is reasonable to assume that what the insurance company intended was that the payment of the judgment becomes a condition precedent to liability only in cases where it denies the applicability of the policy to the accident, or that the policy has been breached or has lapsed, and where for these reasons the company declines to defend or recognize its liability under the policy. This view becomes clearer when we consider the second sentence of clause E, which provides: "No such action shall lie under any agreement of the corporation herein contained, unless brought by the assured himself to recover money actually expended by him." This provision last quoted undoubtedly refers to the costs and expenses incurred in the defense of the personal-injury action, and under the very provisions of the policy the only costs and expenses which the insured could pay would be those incurred when it itself defended and when the insurance company declined to defend. *Patterson v. Adan,* 119 Minn. 308, 138 N. W. 281.

A careful examination of the following cases, *Stenbom v. Brown-Corliss E. Co.* 137 Wis. 564, 119 N. W. 308; *Wis. Zinc Co. v. Fidelity & D. Co.* 162 Wis. 39, 155 N. W. 1081; *Eberlein v. Fidelity & D. Co.* 164 Wis. 242, 159 N. W. 553, will disclose the fact that the questions involved

in this case have not been decided by this court in those cases.

I therefore cannot agree with the conclusions in this case.

The following opinion was filed July 14, 1921:

ESCHWEILER, J. (*dissenting*). I agree in the main with what is said by Mr. Justice DOERFLER in his dissent.

When a judgment was directed by the mandate of this court in favor of the plaintiff as against the Kroeger Brothers Company on the first appeal here, the question of liability was settled and determined. There was nothing further that could properly be done on that question by the garnishee defendant. Its duty and its rights as prescribed in the policy then ceased.

The further steps taken by contesting the payment of such adjudicated liability in the bankruptcy proceedings of the Kroeger Brothers Company was an attempt to evade or avoid and no longer a proceeding to contest the question of liability. By undertaking to assist in an effort to defeat the collection of such adjudicated liability the garnishee defendant was assuming to do something which was not its obligation to do under the terms of the policy. By so doing it should be held to have recognized a responsibility on its own part for such liability and should not now be permitted to say to the contrary.

A motion for a rehearing was denied, with $25 costs, on September 23, 1921.

WILL OF SCHACHT.

May 5—September 23, 1921.

Wills: Execution: Publication: Form: Validity: Undue influence: Insane delusions of testator: Burden of proof.

1. Where the subscribing witnesses to a will testified that it was not read over to testatrix in their presence and that she did not say that the document was her will or request them to sign it, but that they were requested by the attorney who drew the will to witness it, the request being made in the presence and hearing of testatrix, both seeing her affix her signature and each signing the document in her presence, there was a sufficient compliance with the law.
2. The burden of showing alleged undue influence of the executor and beneficiary upon the testatrix is on contestant, as is also the burden of establishing that testatrix was of insufficient mental capacity and that she had insane delusions regarding her daughter.

APPEAL from a judgment of the county court of Milwaukee county: JOHN C. KAREL, Judge. *Affirmed.*

A few days before her death and on February 2, 1920, Johanna Schacht, then about eighty-one years of age, made and executed the last of a series of six or eight wills drawn since 1915, and in some of which contestant had been named beneficiary. It provided in substance for the purchase of a lot in the cemetery and the erection of headstones for herself and a deceased daughter; three bequests of $100 each to persons not related to her; appointed one *Charles E. Paul* executor; and also provided:

"My daughter, *Nellie Winters,* is entirely disinherited and shall receive nothing except as hereinafter provided.

"All my property shall be held in trust by *Charles E. Paul* and shall be converted into cash or other securities at his discretion, and if my grandson William G. Paul is living and shall turn up, he shall receive three thousand dollars. If my grandson does not appear in five years, or if it shall be determined that he is dead, then *Nellie Winters,* my daughter, shall receive two thousand dollars.

"I give and bequeath to *Charles E. Paul* two thousand dollars, this to cover his services, exclusive of actual expenses. . . .

"If there shall be a residue of my estate after all the above are paid, I give and bequeath two thousand dollars to the Associated Charities of Milwaukee, and if there is a residue after the payment of this sum it shall go to *Charles E. Paul.*"

The will was written out in long hand on three sheets of paper, appears to have been signed on the last page by testatrix, and her signature was followed with an attestation clause and with the signatures of Mrs. Schoenfeld and Mrs. Fitzgerald as witnesses.

Objections were filed to its allowance by *Nellie Winters,* the only living child of Mrs. Schacht. *Mrs. Winters* had formerly been married to one Paul, and the William G. Paul described as the grandson of the testatrix in the foregoing instrument was the son of *Mrs. Winters* by the former marriage. The *Charles E. Paul* designated as executor and also provided for in said instrument was the brother of the former husband of *Mrs. Winters.*

After hearing, the will was admitted to probate, and from such order and judgment the contestant has appealed to this court.

For the appellant there was a brief by *Howard P. Haberla,* attorney, and *Wm. J. Kershaw,* of counsel, both of Milwaukee; and the cause was argued orally by *Mr. Haberla.*

A. W. Richter of Milwaukee, for the respondent.

The following opinion was filed May 31, 1921:

ESCHWEILER, J. The contestant urges four objections to the allowance of said will: (1) that it was not properly executed; (2) that its execution was procured by undue influence of *Charles E. Paul,* named executor and beneficiary therein; (3) that the testatrix was not of sufficient mental capacity to make a will; (4) that she was then subject to

insane delusions concerning the contestant, her daughter *Nellie Winters.*

One of the subscribing witnesses was an entire stranger to the deceased, the other had known her but a short time. From their testimony it appears that the will was not read over to the testatrix in their presence nor did she say that the document was her will or request them to sign. They were, however, requested by the attorney who drew the will to witness the will of the testatrix, and such request was in the presence and hearing of the testatrix. They both saw her affix her signature and they each signed the document in her presence and in the presence of each other. Whatever may be the ruling in other jurisdictions, we think it is clear that under the former adjudications of this court there was a sufficient compliance with the law so far as the formal execution of the will is concerned. *Will of Griffith,* 165 Wis. 601, 605, 163 N. W. 138, and cases cited. The objection on that ground was therefore properly overruled.

We find no evidence in the record upon which a finding could have been properly made that *Charles E. Paul,* named as executor and also as beneficiary in said document, exercised anything in the nature of undue influence upon the testatrix in connection with the making of the will. The burden is upon the contestant on such an issue. *Armstrong v. Armstrong,* 63 Wis. 162, 169, 23 N. W. 407; *McMaster v. Scriven,* 85 Wis. 162, 171, 55 N. W. 149; *Will of Ball,* 153 Wis. 27, 37, 141 N. W. 8; *Will of Duncan,* 154 Wis. 39, 44, 141 N. W. 1002. This burden, under the record, has not been so met by the contestant that we would be warranted in setting aside the findings of the trial court in that regard.

On the third and fourth grounds of objection, namely, the alleged insufficient mental capacity of the testatrix and the existence in her mind of insane delusions concerning

her daughter, the burden of proof also rests upon the contestant. *Allen v. Griffin,* 69 Wis. 529, 537, 35 N. W. 21.

From contestant's own testimony it appears that the relationship between the mother and the daughter had been at prior times unfriendly, but that the daughter lived near the mother from about September, 1912, to January, 1917, visiting her frequently, helping in the care of her person and her property; that trouble had arisen between the contestant and her husband, Winters, with whom the mother remained on friendly terms; that in October, 1918, the contestant made application for her own appointment as guardian of her mother, and that upon the hearing of such application the county court deemed it proper to appoint some one to look after Mrs. Schacht's property, but refused to appoint the contestant and appointed a disinterested person, but owing to an appeal being taken from the order of appointment such guardian never acted. From that time on the feeling of the mother towards the daughter was very bitter and she frequently indulged in very extravagant statements of hatred and fear of the daughter. The evidence, however, in this matter falls far short of convincing us that the will was the product of an insane mind or that the trial court was wrong in overruling the objections on each of these grounds. We do not deem it necessary to further discuss in detail this unfortunate situation between mother and daughter. It must suffice to say that the record is such that the findings of the trial court are sustained.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $10 costs, on September 23, 1921.

STATE EX REL. WALTHERS and another, Appellants, vs. JUNG, Town Clerk, Respondent.

May 6—September 23, 1921.

Taxation: Review of assessment: Evidence: Sufficiency: Comparison of assessment with others in district.

1. Under sec. 1052, Stats., requiring real property to be valued by the assessor at the full value which could ordinarily be obtained therefor at private sale, if in any reasonable view the evidence taken by the board of review furnishes a substantial basis for its conclusion as to the value of the land and there is nothing to show that it acted arbitrarily or dishonestly, its decision will not be interfered with by the courts.
2. A taxpayer may not complain of a valuation which could ordinarily be obtained for his property at private sale unless there is such a general undervaluation as will result in an excessive tax to him; but such a situation is not shown by a comparison of the valuation placed on his property with less than two per cent. of the property in the district, unless it appears that improper considerations influenced the valuation of his property.
3. Where the decision of a board of review is sustained by direct and positive evidence as to the value of certain lots, and the only impeaching testimony is that of a witness who compared the assessment of the lots with the assessments placed on less than two per cent. of the other tracts of land in the assessment district, the determination of the board will not be reversed on *certiorari*.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Certiorari to review the determination of the board of review of the town of Rhine, Sheboygan county, Wisconsin, in the matter of objections made by relators to the assessment of certain lands in that town. From a judgment of the circuit court affirming the action of the board of review relators bring this appeal.

F. J. Walthers of Milwaukee, for the appellants.

A. C. Prescott of Sheboygan, for the respondent.

The following opinion was filed July 13, 1921:

OWEN, J. Relators own two pieces of land in the town of Rhine, Sheboygan county, Wisconsin. These tracts or pieces of land are referred to as lots *c* and *d*. Lot *c* contains one and eleven one-hundredths acres and lot *d* contains five and one one-hundredth acres. These lots abut on Crystal Lake, and their principal value is due to their adaptability to summer-cottage purposes. We gather from the record that at one time these lots were subdivided: lot *c* having been divided into three lots and lot *d* into ten lots, but that prior to the assessment here complained of the plat subdividing said lots had been vacated. Lot *c* was assessed by the assessor at $1,700 and lot *d* at $2,800. Through their attorney, E. J. Walthers, the relators made objection to such assessments before the board of review, and the only evidence produced to establish the invalidity of such assessment was the testimony of such attorney, E. J. Walthers. He introduced in evidence the assessments of nine other tracts of land in said town and testified that in proportion to the assessments placed on such other tracts of lands the assessment on lots *c* and *d* was too high. The lands with which he compared the assessment of lots *c* and *d* were either in the main agricultural lands, or lots adapted to summer-cottage purposes, located not on Crystal but on Elkhart Lake. His manner of testifying was to call attention to the assessment of such other lands, followed by the statement that in his opinion the assessment of lots *c* and *d*, as compared with such assessment, was too high. He did not pretend to testify to the true value of lots *c* and *d*. His nearest approach to that is the following and similar statements:

"Placing the same standard on lots *c* and *d* that the assessor has put on lots near the Reis lots would result in a valuation of less than $400 for lot *c* and less than $1,500 for lot *d*."

Mr. R. A. La Budde testified that the lots in lot *c* were worth from $300 to $500 per lot; and Mike Lauer testified that lot *c* was worth the sum of $1,500 and the lots in lot *d* (meaning the subdivisions thereof as they existed before the vacation of the plat heretofore mentioned) were worth from $400 to $600 apiece; there being ten of such subdivisions or lots in said lot *d*, it would make the entire lot worth from $4,000 to $6,000.

The board of review reduced the assessment on lot *c* to $1,500 and left the assessment on lot *d* at $2,800, as fixed by the assessor. The board of review, therefore, had direct and positive evidence sustaining its action. It is well settled that if, in any reasonable view, the evidence taken furnishes a substantial basis for the conclusion of the board, and there is nothing to show that it acted arbitrarily or dishonestly, its decision will not be interfered with by the courts. *State ex rel. Althen v. Klein,* 157 Wis. 308, 147 N. W. 373, and cases there cited. The record, therefore, presents this situation: the statute requires the land to be valued at the full value which could ordinarily be obtained therefor at private sale. Sec. 1052, Stats. The board had before it evidence showing such value of lot *c* to be $1,500 and of lot *d* to be considerably more than $2,800, at which amounts it fixed the assessment.

The only evidence in contradiction is that of Mr. Walthers, the attorney, who testified that such value was relatively too high when compared with the values placed on certain other lands in the town. This comparison included only nine other tracts of land. The town of Rhine is a full township, containing thirty-six sections, which alone would afford 576 governmental descriptions. This raises the question whether a taxpayer may impeach an assessor's valuation of his property by comparing such valuation with less than two per cent. of the descriptions in the assessment district, and testimony that, as compared with such descriptions, the assessed value placed on his land is too high. If this be true, assessments have a precarious stability, because

common knowledge informs us that the average taxpayer can conscientiously testify that his holdings are valued too high in comparison with that of certain of his neighbors. Such a showing does not negative the possibility that, as compared with the other ninety-eight per cent., his property may be valued too low, and falls far short of convincing proof that the valuation placed upon his property will result in an unjust tax upon him. A taxpayer has no complaint when a valuation which could ordinarily be obtained therefor at private sale is placed upon his property, unless there is such a general undervaluation of the other property of the assessment district as will result in an excessive tax as to him. Such a situation is not shown by proof which compares the valuation of a taxpayer's property with less than two per cent. of the other property in the assessment district, unless it appears that improper considerations influenced the valuation of the objector's property, as was the case in *State ex rel. Heller v. Lawler,* 103 Wis. 460, 79 N. W. 777, where the assessment authorities erroneously assumed that the mere act of platting vacant and unimproved property attached to it a value greatly in excess of other property in the same governmental section.

In this case the determination of the board of review is sustained by direct and positive evidence relative to the value of the property in question. This is impeached only by the testimony of Mr. Walthers, the attorney, who states that, as compared with less than two per cent. of the other tracts of land in the town, the valuation is placed too high; but his testimony sustains the conclusion that the lands with which the comparison is made are assessed too low, as readily as the conclusion that relators' lands are assessed too high. The action of the board of review should not be overturned on such evidence, if indeed it is of any probative force whatever upon the question involved.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on September 23, 1921.

CITY OF BOSCOBEL, Respondent, vs. MUSCODA MANUFACTURING COMPANY, Appellant.

June 1—September 23, 1921.

Sales: Machinery annexed to real estate: Transfer of title: Risk of loss: Conditional sale.

1. A contract, valid under the statute of frauds, for the sale of machinery so annexed to the freehold as to be a part thereof, and which provided that the buyer might remove the machinery within a designated time upon the payment of the balance of the purchase price, should be treated and construed as a contract relating to personal property.
2. Under sec. 1684*t*—18, Stats., providing that the property in specific goods is transferred to the buyer at such time as the parties intend, and sec. 1684*t*—19, rule 1, providing that, unless a different intention appears, an unconditional contract to sell specific goods in a deliverable state passes the property to the buyer when the contract is made, though the time of payment or of delivery, or both, be postponed, a contract of sale of the equipment of a power plant for a sum payable part in cash and part before taking such equipment from a building in which it was situated, which was to be done before a specified date, passed title to the buyer, and the risk of loss was on him, under sec. 1684*t*—22.
3. While a sale by the terms of which the purchaser is to pay cash on delivery is in a sense conditional, the distinguishing feature of a conditional sale, as that term is used and understood, is a sale by which the title to the goods is to remain in the seller until the payment of the price but the possession and use of the goods are with the purchaser until there is a default in payment.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Contract. The plaintiff city was the owner of two engines and two steam pumps and other equipment formerly used by it in connection with its municipal lighting plant. The defendant is engaged in the manufacturing business in the city of *Boscobel,* and on December 23d the parties entered into the following contract:

"Boscobel, Wis., 12/23, 1919.

"Sold to *Muscoda Mfg. Co.*, Muscoda, Wis.

"The power plant formerly used by the city of *Boscobel* as an electric light plant, consisting of 2 boilers, 2 engines, 2 steam pumps, water heaters, and all other equipment and fittings that go with outfit.

"*Muscoda Mfg. Co.* agrees to pay the sum of $1,800 for the outfit, to be paid $200 cash, which is hereby paid, and the balance, $1,600, to be paid before taking out the plant, and plant is to be taken out before June 1, 1920. *Muscoda Mfg. Co.* is to repair buildings where boiler is to be taken out in as good shape as before.

"CITY OF BOSCOBEL,
"By John Scheinpflug, Mayor.
"MUSCODA MFG. CO.,
"By B. L. Marcus, Pres."

At the time of the execution and delivery of the contract and the payment of $200 the property was situated within a frame building covered with sheet iron. At the time of the sale the city had insurance upon the property which was not canceled but which expired by the terms of the contract of insurance on the 27th day of February, 1920. On February 12th the George L. Hunt Manufacturing Company leased from the city a part of the building in which the property was situated. The Hunt Manufacturing Company was engaged in the manufacture of a brake mandrel. A part of the process consisted of painting, and in order to furnish additional heat it installed a stove in the northerly end of the building. On March 12, 1920, the building was burned and the property covered by the contract was practically destroyed, being worthless for any purpose except junk. This suit is brought by the plaintiff to recover the remainder of the purchase price, amounting to $1,600, with interest. There was judgment for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Blaine & Kemp* of Boscobel, attorneys, and *Daniel H. Grady* of Portage, of

counsel; and the cause was argued orally by *Mr. H. E. G. Kemp* and *Mr. Grady*.

For the respondent there was a brief by *R. M. Orchard* of Boscobel, attorney, and *J. E. Barnett* of Lancaster, *C. F. Whiffen* of Boscobel, and *Andrew Lees* of La Crosse, of counsel; and the cause was argued orally by *Mr. Orchard*.

The following opinion was filed July 13, 1921:

ROSENBERRY, J. Two principal questions are raised upon the appeal: First, Did the contract of December 23, 1919, vest the title to the property in the defendant? Second, Did the court err in refusing to submit to the jury the question of whether or not the plaintiff was guilty of negligence in permitting its lessee, the George L. Hunt Manufacturing Company, to maintain upon the premises an unsafe stove and thereby materially increase the hazard to which the property of the defendant was subjected?

A preliminary question was suggested upon the argument as to whether or not the situation was affected by reason of the fact that the property which formed the subject matter of the sale was a part of a building and so annexed to the freehold as to make its sale the transfer of an interest in real property. It is not claimed that the memorandum, even if the property be considered as an interest in real property, did not sufficiently comply with the requirement of the statute of frauds. The contract being valid, the property was by its terms to be severed from the land upon which it stood. The contract should therefore be treated and construed as a contract relating to personal property. *Wetkopsky v. New Haven G. L. Co.* 88 Conn. 1, 90 Atl. 30; 1 Williston, Contracts, § 520.

Whether or not the title to the goods described in the contract passed to the defendant depends upon the intention of the parties. Sec. 1684*t*—18, Stats. The contract itself does not in terms say when the title should pass. Recourse must

be had, therefore, to rules of construction. Sec. 1684*t*—19 establishes the rules for ascertaining the intention of the parties as to the time at which the property in goods is to pass to the buyer where there is no specific provision in the contract. Rule 1:

"Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed."

In this case the goods were ascertained and in a deliverable state. The buyer had the right at any time before June 1, 1920, upon payment of the remainder of the purchase price, to take the goods, and if the plaintiff had, upon tender being made to it, refused to deliver the goods, the right of the defendant to recover the same in an action of replevin would have been complete.

It is argued that the sale was conditional, that the payment of the remainder of the purchase price was a condition precedent to the right of the defendant to the possession of the property. While a sale by the terms of which the purchaser is to pay cash on delivery is in a sense conditional (35 Cyc. 323), the distinguishing feature of a conditional sale, as that term is used and understood, means a sale by which the title to the goods is to remain in the seller until the payment of the price but the possession and use of the goods are with the purchaser until there is a default in payment. Sec. 1684*u*—1. The facts in this case bring it squarely within the provisions of Rule 1, and it must be held that the title to the goods passed to the defendant and the risk of loss was with it. Sec. 1684*t*—22, Stats.; *State ex rel. Vilas v. Wharton,* 117 Wis. 558, 94 N. W. 359; *Thayer v. Davis,* 75 Wis. 205, 43 N. W. 902.

We have carefully reviewed the evidence and are of the opinion that the trial court correctly held that there was no

evidence which would have sustained a finding by the jury that the plaintiff was guilty of a want of ordinary care in the management of its property, and further, that if it should be held that there was evidence as to a want of ordinary care there is no evidence to sustain a finding, if one should be made, that such want of ordinary care was the proximate cause of the injury which the defendant suffered by reason of the burning of the building. The claim is that the plaintiff was negligent in permitting its building to be occupied by the Hunt Manufacturing Company, particularly with reference to the use of a stove. That the defective character of the stove was the cause of the fire rests upon mere speculative inference, the evidence being almost if not quite conclusive that the fire did not originate by reason of the defective condition of the stove.

By the Court.—Judgment affirmed.

ESCHWEILER and OWEN, JJ., dissent.

A motion for a rehearing was denied, with $25 costs, on September 23, 1921.

APPLICATION OF STATE BOARD OF LAW EXAMINERS.

February 9—September 27, 1921.

Attorneys: License to practice: Fraud: Revocation of license.

Where an attorney, applying to the supreme court for admission to practice, represented that he was a practicing attorney in good standing in another state, but the evidence later disclosed that he had been guilty of gross professional misconduct and that proceedings for his disbarment were pending in the state of his former residence, which he evaded by resigning his position as attorney in such state, his license to practice in Wisconsin will be revoked.

APPLICATION by the *State Board of Law Examiners* to annul an order of this court admitting *Julius Geweke* to practice as an attorney. *Application granted.*

Winfield W. Gilman, assistant attorney general, and *William R. Bagley,* President of the *State Board of Law Examiners,* of Madison, for plaintiff.

Julius H. Geweke of Watertown, *in pro. per.*

SIEBECKER, C. J. An order was entered by this court on the 9th day of February, 1921, annulling the order admitting *Julius H. Geweke* to the practice as an attorney at law. The record then before the court shows that he had misled this court at the time he applied for admission to be licensed to practice as an attorney by misrepresenting that he was then a practicing attorney in good standing in the state of Illinois. The facts adduced in evidence show that he at that time had been guilty of gross professional misconduct. It appears that he had committed the offense of embezzling funds of his clients; that he wilfully concealed from this court the fact that proceedings had been instituted against him in the courts of Illinois for his disbarment, and that he had evaded prosecution in such proceeding by resigning the position as a licensed attorney in such state before the charges so preferred against him came to a hearing. It is shown that he offended against the law and was guilty of conduct unbecoming a lawyer in good standing. His misconduct consisted in fraudulent misrepresentation to his clients as to the state of affairs concerning the business intrusted to him by them and in having committed offenses of a grave and serious nature. It is a matter of surprise to learn that respondent was permitted to ply his nefarious practices for so long a time as he did. The unmolested continuance of his depredation evinces a deplorable lack of activity for the preservation of honorable professional standing and an inexcusable neglect of having him disbarred from the ranks of attorneys at law. Courts and members of the legal profession are charged with the duty of having such transgressors speedily disbarred for the protection of the community and the maintenance of the honor and dignity of the profession.

The office of attorney is a most important one and demands of every member the strictest adherence to every tenet of morality. Ethical delinquencies by a member of the bar disgrace not only the offender, but—

"His shame defiles the law itself. The law must speak through the profession to other men. They depend upon the lawyer when they depend upon the law. He is identified with it. Its character as a useful and noble service depends upon the character of the profession. So as men see the profession in individuals rather than in the whole, it has happened that much unmerited reproach and obloquy has fallen on the law."

These words, spoken by the late Senator Vilas to the Law Class of the State University are utterances which convey precious and solemn truths. They express an ideal that every member of the bar of honorable intentions aspires to achieve. This court in *Vernon County Bar Association v. McKibbin,* 153 Wis. 350, 141 N. W. 283, declared:

"An attorney is an officer of the court and, in a sense, of the state. The position is one of much dignity and responsibility. It is very important to the people and the court that the standard of admission to the place and retention thereof should be as high as practicable in law, and maintained as high as practicable in fact."

The comments of former Chief Justice Ryan in speaking to the members of the bar of their duty to preserve the power and influence of the profession are pertinent and informing in this connection:

"A knavish lawyer is certainly the most dangerous of all knaves. For it is to the profession that in time of peril all rights of person and property are committed. The bar is the trustee of everything which man holds sacred, and the opportunity to betray is fearfully easy. Indeed it may be truly said that integrity of character is as essential to a lawyer as professional learning. For without innate love of truth and justice it is impossible truly to comprehend a profession essentially founded on truth and justice."

The power of courts to remove an unfaithful member from the office of attorney has been recognized and asserted by the courts of this state from an early day. *In re Mosness,* 39 Wis. 509; *In re Orton,* 54 Wis. 379, 11 N. W. 584; *Vernon County Bar Association v. McKibbin,* 153 Wis. 350, 141 N. W. 283. See, also, Ann. Cases 1913D, 1156 *et seq.*

The case before us is so clear and flagrant a breach of professional ethics that comment on the facts is superfluous. The manner in which respondent exercised the privileges of an attorney shows him to be an unfit and unsafe person to hold the privileges conferred upon a licensed attorney. The court being officially advised that respondent has forfeited the right to hold the office of attorney at law, there is no other course to follow than to have his license revoked and debar him from exercising the privileges of this office. It is a duty the court owes to the profession, to the people of the state, and to an honorable and upright administration of justice.

The petition praying for the revocation of defendant's license admitting him to the practice as attorney in the courts of this state must be granted.

DOERFLER, J., took no part.

STATE, Plaintiff, vs. FISCHER, Defendant.

September 23—October 7, 1921.

Criminal law: Jurisdiction of circuit courts: How curtailed: Inferior courts: Grand jury: Writ of prohibition.

1. Under sec. 8, art. VII, Const., and sec. 113.03, Stats., the circuit court is a court with general jurisdiction to hear all matters, civil and criminal, within this state, and no portion of its jurisdiction can be deemed to have been taken away from it excepting only by unmistakable legislative language to that effect.

2. Ch. 18, Laws 1909, creating the municipal court of Kenosha county, though it gives that court jurisdiction to summon a grand jury and proceed with indictments, does not deprive the circuit court for Kenosha county of such jurisdiction.
3. A writ of prohibition is the proper and the only remedy that would afford adequate relief where an indictment has been returned to a court which had no jurisdiction to summon a grand jury and proceed by indictment.

Petition for writ of *certiorari*. *Denied.*

For the plaintiff there was a brief by the *Attorney General, J. E. Messerschmidt,* assistant attorney general, *Frank S. Symmonds,* district attorney of Kenosha county, and *Mortimer E. Walker,* special assistant district attorney; and the cause was argued orally by *Mr. Messerschmidt* and *Mr. Walker.*

For the defendant there was a brief by *Cavanagh & Mittlestaed* of Kenosha, and oral argument by *R. P. Cavanagh.*

The following opinion was filed October 7, 1921:

Per Curiam. In this case it is decided:

(1) That the writ of *certiorari* to review the orders of the circuit court for Kenosha county overruling defendant's motion to dismiss and quash the indictment presented by the grand jury against the above named defendant, was improvidently issued and must be quashed.

(2) That the circuit court for Kenosha county by indictment has jurisdiction of the offense charged against this defendant.

An opinion will be filed expressing the views of the court upon the question involved in this decision.

On October 18, 1921, the following opinion was filed:

Petition to this court for a writ of *certiorari* to review orders of the circuit court for Kenosha county, E. B.

BELDEN, Circuit Judge, presiding, dated September 1, 1921, overruling petitioner's motion to dismiss an indictment and overruling petitioner's motion to quash such indictment, for the reason that said circuit court for Kenosha county has no jurisdiction of the matter.

DOERFLER, J. At the regular March term in the year 1921 of the circuit court for Kenosha county, a grand jury having been summoned, impaneled, sworn, and charged to inquire for the state of Wisconsin did, on the 12th day of August, 1921, during said term, present an indictment containing four counts against the petitioner charging him with the unlawful sale of intoxicating liquors under sec. 1569—3, Stats. Petitioner was thereupon arraigned before said circuit court, pleaded not guilty to each of the counts of said indictment, and, among other things, moved to dismiss said indictment for the reason that the circuit court for Kenosha county has no jurisdiction in said matter. The motion of the petitioner was overruled, and he now seeks to have a review of the order of the circuit court by a writ of *certiorari* from this court.

During the argument of the matter before this court it was stipulated in open court, by the respective counsel for the parties, that if this court should be of the opinion that the matter could not properly and legally be determined upon a writ of *certiorari,* then and in that case the matter could be treated as though it were before the court upon a petition for a writ of prohibition.

We will first consider and determine the issue involved with respect to the jurisdiction of the circuit court.

Sec. 8, art. VII, Const., provides as follows:

"The circuit courts shall have original jurisdiction in all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law."

Sec. 113.03, Stats., reads as follows:

"The circuit courts have the general jurisdiction prescribed for them by the constitution, and have power to issue all writs, process and commissions provided therein or by the statutes, or which may be necessary to the due execution of the powers vested in them. They have power to hear and determine, within their respective circuits, all civil actions and proceedings and all cases of crimes and misdemeanors of every kind, not exclusively cognizable by a justice of the peace or some other inferior court; and they have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carry into effect their judgments, orders and other determinations, subject to re-examination by the supreme court as provided by law. Said courts and the judges thereof have power to award all such writs, process and commissions, throughout the state, returnable in the proper county."

The circuit court, therefore, is a court with general jurisdiction to hear all matters, civil and criminal, within this state, and no portion of its constitutional or statutory jurisdiction can be deemed to have been taken away from it by the legislature excepting only by some unmistakable legislative language to that effect. *Wieden v. State,* 141 Wis. 585, 124 N. W. 509; *State v. Grunke,* 88 Wis. 159, 59 N. W. 452; *Faust v. State,* 45 Wis. 273; *Goyke v. State,* 136 Wis. 557, 117 N. W. 1027, 1126. So that it is clear from the provisions of the constitution and statutes above cited, and the interpretations of such provisions in the cases above referred to, that the circuit court for Kenosha county, at the time when the grand jury was summoned and while the proceedings were had under the indictment in question, had full and complete jurisdiction over the subject matter involved, unless said circuit court had been deprived of such jurisdiction by legislative enactment, clear and unmistakable in its import and in the language used.

Ch. 18, Laws 1909, creating a municipal court in Kenosha county and defining its jurisdiction, etc., provides, among other things, as follows:

"Section 3. The municipal court of Kenosha county shall have and exercise powers and jurisdiction concurrent with and equal to the circuit court of Kenosha county in bastardy cases and in all cases of crimes and misdemeanors arising in said county, wherein the maximum penalty does not exceed five years in the state prison."

Under this section of the Kenosha act it is clear that no jurisdiction is taken away from the circuit court and that the jurisdiction of the municipal court in all cases of crimes and misdemeanors arising in said Kenosha county wherein the maximum penalty does not exceed five years in the state prison is concurrent with and equal to that of the circuit court.

Sec. 6 of said Kenosha act provides:

"Said judge and the several circuit court commissioners shall have exclusive jurisdiction to institute and conduct examinations in all criminal and bastardy cases arising within the county of Kenosha, and the power and jurisdiction to cause to come before him or them the persons so charged with committing bastardy or any criminal offense, within such county, and commit them to jail or bind them over for trial at the next term of said municipal court or to the circuit court as the case may require, and on a plea of guilty by the accused and a request by him to be sentenced, the said judge shall have power, authority and jurisdiction to sentence the accused for any offense except homicide."

Sec. 6 makes it clear that the object and purpose of creating the Kenosha municipal court was to relieve in a large measure the circuit court for Kenosha county and to divert a considerable portion of the business, which prior to that time had been sent to the circuit court, to the municipal court. So that, while the circuit court has not been deprived of any jurisdiction and while it has not had its juris-

diction curtailed, the legislature has seen fit, by means of the Kenosha act, to establish a new course which actions and proceedings must take, which, after having originated in the municipal court and before court commissioners, are diverted from their former course to the circuit court, to the newly created court, namely, the municipal court.

This conclusion so arrived at is the only one which harmonizes with the provisions of sec. 3 of the Kenosha act, under and pursuant to which the municipal court of Kenosha county is authorized to exercise powers and jurisdiction *concurrent* with and equal to the circuit court for Kenosha county in bastardy cases and in all cases of crimes and misdemeanors arising in said county wherein the maximum penalty does not exceed five years in the state prison.

Note, however, that the section last above referred to confers exclusive jurisdiction to institute and conduct examinations, etc., in the cases referred to in said section, and nowhere refers to indictments of a grand jury. So that, unless in other provisions of the act, in express and clear and unmistakable language, it deprives the circuit court of its right to summon a grand jury in all criminal cases and to proceed by indictment, the circuit court has not been deprived of such jurisdiction and still retains the same.

Inasmuch as the other provisions referred to in said sec. 6 are not germane to the specific issue involved herein they will not be further considered herein.

Sec. 7 of said Kenosha act provides as follows:

"All examinations, recognizances and commitments from or by said municipal judge or other examining magistrates of said county of Kenosha in bastardy cases, and in all criminal cases wherein the maximum penalty does not exceed five years in the state prison, shall be certified and returned to such municipal court instead of to the circuit court for said county of Kenosha, within the time prescribed by law, and the attendance of witnesses required upon the trial of any person so committed shall be secured in the same

manner as provided by law in the circuit court, and all such cases shall thereafter be proceeded with and tried in said municipal court, as provided by law in similar cases in circuit courts."

Sec. 10 of said Kenosha act provides:

"If any person charged upon indictment or information with a criminal offense shall have procured a change of venue to the circuit court of Kenosha county, said municipal court shall commit or hold the party to bail to appear at the next term of the circuit court," etc.

The word "indictment" as used in sec. 10 refers specifically to an indictment returned in the municipal court of Kenosha county, and inasmuch as sec. 3 of the act confers concurrent jurisdiction upon the municipal court equal to the circuit court for Kenosha county in all cases of crimes and misdemeanors arising in said county wherein the maximum penalty does not exceed five years in the state prison, the conclusion is irresistible that the conferring of such jurisdiction also gives jurisdiction to the municipal court to summon a grand jury and to proceed by indictments, etc.

Sec. 10 also makes it clear that the circuit court for Kenosha county has jurisdiction to hear and try all cases coming to it pursuant to a change of venue from the municipal court.

Nowhere in the municipal court act is there anything to indicate, by express language or by implication, that it was the intention of the legislature to, or that it did, deprive the circuit court for Kenosha county of jurisdiction to summon a grand jury and to proceed with indictments. Therefore it necessarily follows that the jurisdiction of the circuit court with respect to the matters involved in the instant case has in nowise been curtailed or impaired.

We now come to the other issue involved in this case, namely: Assuming that the circuit court had no jurisdiction in this case, would the proper procedure be to apply for a

writ of prohibition, or would the writ of *certiorari* afford a proper remedy?

In *Hauser v. State,* 33 Wis. 678, and in *Martin v. State,* 35 Wis. 294, writs of *certiorari* were issued and the questions involved in those cases were considered and determined by this court as though such writs were proper writs under the circumstances. In those cases, however, the regularity and propriety of the writs were assumed, and the practice was not in fact determined in the decisions.

In *Chittenden v. State,* 41 Wis. 285, 293, which was a criminal case in the circuit court for Dane county, in which an attempt was made to remove the case for a second time, and the court retained jurisdiction, and it was sought to raise the question of jurisdiction of the court by a common-law writ of *certiorari,* the court uses this language:

"To our minds it is a serious question whether this position of counsel is not correct and in strict accord with the principles and rules of practice which govern proceedings in civil and criminal actions. It is obvious that the writ is resorted to in the present case as a mode of appeal from the decision of the circuit court refusing to dismiss all proceedings in the cause. And the question is, whether such a ruling can be brought before this court for review by a common-law *certiorari.* The circuit court is a court of general jurisdiction in civil and criminal matters, under the constitution; and it was proceeding in the action according to the course of the common law. If the court was proceeding in the cause without jurisdiction, the appropriate writ to be applied for from this court would seem to be the writ of prohibition, and not a common-law *certiorari.* It seems to us, if the writ is a proper process for correcting the alleged error of the circuit court in refusing to dismiss the proceeding, it might be resorted to at any stage of the cause to bring up for review any erroneous decision which that court might make. The great inconvenience which would result if such a practice is sanctioned is too obvious to need comment. True, in the *Hauser Case* [33 Wis. 678] the writ was sued out to review a decision of the municipal court of the city

of Milwaukee refusing to quash an information for publishing a libel. In the *Martin Case* [35 Wis. 294], the question was whether the circuit court, under the circumstances, should have changed the place of trial. If the question of practice had been considered and settled by the court in those cases, we should feel bound by the adjudications. But it was not; and therefore, under the circumstances, the question of practice will be deemed an open one in this court. On account of the absence of the chief justice, no attempt will be made to settle the practice in this case; but we thought it advisable to make the suggestions we have, in order that the profession might not be misled by the above decisions, or infer that the practice was already definitely determined and settled in such cases."

It is also held in *Barry v. Blackhawk Co. Dist. Court,* 167 Iowa, 306, 149 N. W. 449, that the mere fact that a court proposes to act in excess of jurisdiction or entirely without jurisdiction is to be remedied by a writ of prohibition rather than the writ of *certiorari.* See, also, 11 Corp. Jur. p. 90. And in speaking of a writ of *certiorari* it is said:

"It is not a flexible remedy, inasmuch as all that can be done under it is to quash or to refuse to quash the proceedings complained of. The office of a *certiorari* is to bring up the proceedings of the court below for examination, that they may be affirmed or quashed, and not to enforce any rights growing out of those proceedings. It would therefore not be a proper or an adequate remedy."

"The writ of prohibition is an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal properly and technically denominated such, or to an inferior ministerial tribunal possessing incidentally judicial powers and known as a *quasi*-judicial tribunal, or even in extreme cases to a purely ministerial body, commanding it to cease abusing or usurping judicial functions. A writ of prohibition is a prerogative writ to be used with great caution and forbearance for the furtherance of justice, and for securing order and regularity in all the tribunals where there is no other regular and ordinary remedy. The legitimate scope and purpose of the

writ is to keep inferior courts within the limits of their own jurisdiction, and to prevent them from encroaching upon the jurisdiction of other tribunals." 32 Cyc. 598, 599.

"The power of 'a general superintending control over all inferior courts' which the constitution (art. VII, sec. 3) grants to this court was first extensively considered and its limits defined in the case of *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081. The subject has been discussed in a number of cases since that time, but no attempt has been made either to vary or enlarge the general principles laid down in the first named case, but, on the other hand, in all of the subsequent cases those principles have been either literally or in substance approved and applied.

"Those principles in substance are that this jurisdiction is not to be exercised upon light occasion, but only upon some grave exigency; that the writs by which it is exercised will not be used to perform the ordinary functions of an appeal or writ of error; that the duty of the court below must be *plain;* its refusal to proceed within the line of such duty, or, on the other hand, its intent to proceed in violation of such duty must be *clear,* the results must be not only prejudicial, but must involve extraordinary hardship; the remedy by appeal or writ of error must be utterly inadequate; and the application for the exercise of the power of superintending control must be speedy and prompt." *Petition of Pierce-Arrow M. C. Co.* 143 Wis. 282, 127 N. W. 998; *State ex rel. Fourth Nat. Bank v. Johnson,* 103 Wis. 591, 79 N. W. 1081; *State ex rel. Milwaukee E. R. & L. Co. v. Circuit Court,* 133 Wis. 442, 113 N. W. 722; *State ex rel. Milwaukee v. Ludwig,* 106 Wis. 226, 82 N. W. 158; *State ex rel. Umbreit v. Helms,* 136 Wis. 432, 118 N. W. 158.

It will readily be seen that, assuming that the circuit court had no jurisdiction in the instant case, all of the requirements based upon the aforesaid principles would exist in the highest degree, and that therefore a writ of prohibition, as is practically conceded by the learned counsel for the state and as is strongly intimated in the case of *Chittenden v. State,*

41 Wis. 285, would be the proper and the only remedy that would afford adequate relief.

However, it having been herein held that the circuit court has jurisdiction in this case, the application for a writ of prohibition must be denied.

By the Court.—It is so ordered.

SCHROEDER, Trustee, Respondent, vs. ARCADE THEATER COMPANY and others, Appellants.

SCHROEDER, Trustee, Respondent, vs. BERLIN ARCADE REAL ESTATE COMPANY and others, Appellants.

March 11—October 18, 1921.

Mortgages: Trust deeds: Nature and legal effect: Construction: Equities subsequently accruing: Priorities: Trustee: Representative capacity: Authority: Source of powers: Duty to use good faith: Subjecting trust deed to lease: Real parties in interest: Estoppel: Entry after condition broken: Attornment: Relation between trustee and tenants of mortgagor: Foreclosure: Trustee as party in individual capacity: Interpleader: Accounting by trustee: Default of mortgagor: Notice: Failure to pay taxes: Interest advanced by trustee: Subrogation: Unauthorized act of trustee: Who may question: Second mortgagees: Marshaling assets and securities.

1. A deed of trust is a security for money advanced under the bond issue, and in legal effect is nothing more than a mortgage, title to the property remaining in the mortgagor and the mortgage merely securing the debt. The right of a mortgagee who has secured peaceable possession of the mortgaged premises after condition broken to retain them until the debt is paid, is not based on any title in him, but upon his equitable right to be paid without being put to the costs of an action.
2. Trust deeds, although of comparatively recent origin, are to be encouraged because they offer an opportunity of investment to the public at large in remunerative and successful enterprises and because they have a tendency to bring about a mutuality of interest and better understanding among employers and employees generally. The salability of the bond

issue depends upon the fixed and unshakable security of the trust deed, and therefore the general rule has been evolved that a fixed legal right under a mortgage cannot be impaired by any equity subsequently arising.

3. The trustee of the deed of trust in some respects represents the bondholders, in other respects the mortgagor, and in still other respects both bondholders and mortgagor; but the provisions of a mortgage are not personal to the mortgagee, but are for the benefit and security of the mortgage debt.
4. The authority of the trustee to act for the bondholders is prescribed and limited by the terms of the trust deed; and an analysis of the provisions of the instrument here involved discloses that the contracting parties appreciated that the rights, powers, duties, and privileges of the trustee depend upon the trust instrument.
5. Since by the trust deed the trustee is required and obligated to act in a dual capacity, it is incumbent on him, in the execution of his duties and powers, to use the utmost good faith towards all parties in interest.
6. Where the owner of a ninety-nine-year lease on real property erected a substantial building, and upon the property thus improved placed a large bond issue maturing five years from its date, and subsequently made a fifteen-year lease with a theater company which expended considerable sums in alterations of the building, the fact that representatives of the theater company, before any default in the conditions of the trust deed, interviewed the trustee and discussed the terms of the proposed lease, and that the trustee approved both the lease and the proposed alterations, did not make the trust deed subject to the lease, as the trustee was not authorized, expressly or by necessary implication, by any of the provisions of the trust deed, to subject the trust deed to a subsequently-made lease.
7. The real party in interest is not the trustee but the bondholders, and since they had no knowledge of the lease of the theater company or of the proposed changes, and the trustee having no authority to make a lease, the bondholders are not estopped from claiming the priority of the trust deed over the lease.
8. The assignment of rents to the mortgagee, followed by notices of such assignment, served by both mortgagor and mortgagee on the theater company, and the payment of rents to the mortgagee thereafter, did not establish the relationship of landlord and tenant, as the law of attornment does not apply as between the tenant of a mortgagor and the mortgagee in those states where the legal title does not pass to the mortgagee.

9. After entry by the mortgagee upon condition broken he may treat tenants under leases subsequent to his mortgage as trespassers, or he may recognize them as his tenants. In this case, where the mortgagee entered after condition broken, collected rents, and immediately commenced foreclosure, it is *held* that the mortgagee manifested his intention of not treating the tenant as a trespasser, but of treating him as a new tenant under a lease terminating upon the sale of the property in the foreclosure proceedings.
10. A trustee foreclosing a trust deed cannot be considered a party as an individual unless he is impleaded in his individual capacity.
11. Failure to use reasonable diligence, or an abuse of his discretionary powers, renders a trustee under a trust deed personally liable to the party injured for the damages done.
12. Under secs. 2610 and 2656*a*, Stats., the court could have permitted the interpleading of the trustee as an individual, even after the trial of the issues had proceeded for a period of two weeks, so as to enable an accounting and a final adjudication of the issues presented by defendants, who claimed that the trustee had misappropriated funds.
13. The right to interplead a third person under secs. 2610 and 2656*a*, Stats., is discretionary with the court, but an order denying a motion to bring in a person who may be a proper but not a necessary party is not appealable.
14. A trust deed which provided that in case a default in the payment of interest continued for six months after written demand for payment, or in case default should be made in the performance of any of the provisions of the trust deed or in the lease which was mortgaged under such trust deed it was lawful for the trustee, and upon request of a designated number of bondholders it was his duty, to enforce by foreclosure or otherwise the terms of the trust deed, and which provided further that in case of default by the mortgagor in the performance of the conditions of the lease, one of which was the obligation to pay taxes, the trustee might declare the whole debt due,—authorized the trustee without a meeting of the bondholders, upon failure of the mortgagor to pay taxes, to declare the principal due and to proceed to a foreclosure.
15. Although the lease provided that any successor in interest of the lessee was entitled to six months, after written notice, to comply with any provision of the lease alleged to have been breached, the trust deed is construed to authorize the trustee to declare due and foreclose the whole issue upon default in payment of taxes.

16. Where the evidence showed that the trustee had advanced moneys for the payment of interest and held the matured interest coupons as security for such advances, the trustee is subrogated for the payments so made to the interest of the bondholders under the coupons.
17. If the trustee misapplied the proceeds of the bond issue by authorizing the mortgagor to expend the same for purposes other than as limited by the trust deed, the bondholders might, by appropriate pleading, have enforced an accounting as to such improper expenditure, but they might also rely on the security of the trust deed. The clause in the trust deed as to the expenditure of the proceeds of the issue is a personal covenant between mortgagor and bondholder, which in no manner inures to the benefit of the second-mortgage bondholders, and does not run with the land so as to enable the latter to take advantage of it.
18. The doctrine of marshaling of assets and securities is recognized in this state and should be applied wherever available, if the same does not work hardship or inequity to the interests of the first-mortgage bondholders; but this doctrine is inapplicable where the paramount creditor is sought to be compelled to exhaust a mere personal remedy.

ESCHWEILER, J., dissents in part.

APPEALS from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed.*

This is an action brought by the plaintiff, as trustee for bondholders, to foreclose a certain mortgage in the form of a trust deed, executed by the defendant *Berlin Arcade Real Estate Company* (hereafter referred to for convenience sake as *"Real Estate Company"*).

The *Real Estate Company,* in the year 1912, was the owner of a ninety-nine-year lease upon the following described real estate, to wit: *Lots numbered fourteen (14) and fifteen (15) in block numbered twelve (12), in W. P. Young's subdivision, in the Thirteenth ward of the city of Milwaukee, Milwaukee county, Wisconsin,* which lease it held under and pursuant to an assignment from the Realty Investment Company, a corporation, the lease having been entered into on the 27th day of April, 1912, by and between

Maria Niemann, of Milwaukee, Wisconsin, and said Realty Investment Company.

On the 28th day of June, 1912, the *Real Estate Company* executed a trust deed or mortgage on its leasehold interest, for the sum of $125,000, to the plaintiff *Edward Schroeder,* as trustee for bondholders, to secure the payment of 250 bonds, each bond being in the sum of $500 and being numbered consecutively as numbers 1 to 250, inclusive, bearing interest at the rate of six per cent. per annum, payable semi-annually, in accordance with certain interest coupons thereto annexed, the principal of the bonds being payable under the terms thereof on the 1st day of November, 1917. This trust deed constituted a first mortgage upon the leasehold interest of the *Real Estate Company.*

On the same day, to wit, the 28th day of June, 1912, a second mortgage or deed of trust was executed by the *Real Estate Company* on said property to the plaintiff, *Edward Schroeder,* as trustee for bondholders, for the purpose of securing the payment of 100 bonds, each for the sum of $500, or a total of $50,000. Said second trust deed or mortgage constituted a second mortgage upon said real estate, subject to said first mortgage for $125,000.

The plaintiff continued to act as trustee under both of said mortgage bond issues until the 28th day of June, 1916, at which time he resigned as trustee under the second mortgage, and shortly thereafter commenced this action of foreclosure on the first mortgage or trust deed. Subsequently, and by proceedings duly had, the defendant *Leonard Leidig* was duly appointed by the court as trustee under the second trust deed or mortgage, and was made a party defendant to the foreclosure proceedings.

In and by the ninety-nine-year lease above referred to, executed by the said Maria Niemann to the Realty Investment Company, the said Realty Investment Company, its successors and assigns, agreed, under what is known as the

third paragraph of said lease, to erect upon the leased premises, within five years from the date of the lease, a new business building of modern construction, not less than four stories in height, at a cost of not less than $75,000, and to insure and keep insured such building, when so erected and constructed, against loss or damage by fire in the sum of $30,000 in good and responsible fire insurance companies, the policies of insurance to be assigned and delivered to the lessor and to be held by her as security for the faithful performance by the lessee of the terms and conditions of said lease. In and by said lease the lessee also covenanted and agreed that "the new building so to be erected shall be substantial, and shall in every respect comply with the laws, ordinances, and regulations, municipal or otherwise, that may govern the construction of the same, and shall save said lessor harmless of and from any loss or damage by reason of the construction of said new building and by reason of any mechanics' liens or incumbrances of any kind or nature."

Said ninety-nine-year lease also contains what is known as the eleventh paragraph thereof, which provides as follows, to wit:

"It is understood and agreed that it will be necessary that the buildings and improvements now upon said lands be removed or demolished . . . as hereinbefore provided, to make room for the new building to be erected by the lessee, and that lessee may make alterations in any building from time to time, but shall not make such as will substantially depreciate the value of any building."

In other respects said ninety-nine-year lease contains provisions of the usual and ordinary nature of documents of that kind.

The mortgages above referred to were executed for the purpose of raising money to pay in part the cost of the erection and construction of said proposed new building and for other purposes.

Said first trust deed or mortgage, among other things, contains the following provisions, to wit:

"Now, therefore, this indenture witnesseth, that the mortgagor, for and in consideration of the premises and of $1 received by it from the trustee, and in order to secure the due and punctual payment of the principal and interest of all of the bonds issued hereunder, and at any time outstanding, does hereby convey and assign unto the trustee, his successors and assigns forever, all its right, title, and interest in, to, and under said lease, hereto annexed and marked 'Exhibit A,' and to any and all future income, rents, and revenue from the lease and leased property and any part thereof."

The *habendum* clause of said trust deed, among other provisions, contains the following:

"That until default shall be made and continued by the mortgagor in the payment of the principal or interest of any of the said bonds hereby secured as hereinafter provided, or until default shall be made and continued in respect to some act, thing, obligation, or agreement herein required to be done, performed, or kept by it as hereinafter or in said lease provided, the mortgagor shall be permitted to possess, manage, use and enjoy said property and the improvements, appurtenances, rights, and privileges, and to take and use the incomes, revenues, rents, and profits thereof as if this mortgage had not been made."

Said trust deed or mortgage also contains an agreement on the part of the *Real Estate Company* to the effect that the leased premises shall be maintained and shall not at any time during the continuance of the mortgage be torn down or removed without the consent of the trustee and all of the holders of the bonds issued under said first bond issue, and in the event of the destruction by fire or otherwise the said mortgagor will repair or rebuild the same forthwith, or erect a new building of equal value, to cost at least the sum of $125,000, and that in the event that the mortgagor fails within ninety days after the damage or destruction of the building to repair or rebuild the same, it shall become lawful

for the trustee, and it shall be his duty, upon a demand in writing signed by the holders of one third of the bonds then outstanding, to enter and take possession of the demised premises and exclude the mortgagor therefrom, and repair, rebuild, and replace the building upon said premises in as good condition as the building was before such damage had occurred, and to pay for the rebuilding and repair of said building out of the moneys received on the insurance loss.

In connection with the foregoing provisions with respect to the rebuilding and repair of the building upon the premises damaged or destroyed by fire, said trust deed or mortgage also contains the following provision, to wit:

"The mortgagor will and the trustee may in all things keep, observe, and perform all the covenants in said lease contained in respect to repairing, rebuilding, and replacing the building to be erected on said premises as in said lease provided to be done by the lessee."

The second article of the trust deed contains the following provision, to wit:

"The said mortgagor has contracted for the erection of a store and office building to be known as the Berlin Arcade Building upon said lands, and the trustee shall receive and hold all of said bonds, with full power and authority to sell and dispose of all or any of them at such prices and upon such terms and conditions as the trustee may deem advisable, and the trustee shall use and apply said bonds and the proceeds of any sale or sales thereof, in paying and liquidating the cost of erection of such building upon the said lands, and none of said bonds and none of the proceeds of sales thereof shall be used for any other purpose or purposes."

Said article also provides for the payment by the trustee of all sums due to contractors and materialmen employed in the construction of the building upon said premises under the written order and direction of one Robert T. Newberry, architect.

Among other provisions in said trust deed or mortgage is one authorizing the trustee to raise and borrow money

on the security of the mortgage, lease, and premises, or upon any sublease, for the purpose of paying off any sum due for interest, rentals, insurance, taxes, or other charges payable by the lessee under said ninety-nine-year lease, or any charges or any lien for the time being charged upon the mortgaged property or any part thereof, in priority to the trust deed, with such interest and upon such terms as to the trustee may seem best.

Article 5 provides, among other things, as follows, to wit:

"In case default shall be made in the payment of any interest on any of the bonds issued hereunder, and shall continue for the period of six months after payment of such interest shall have been duly demanded in writing, or in case default shall be made in the payment of the principal of any of said bonds, or in case the mortgagor fails to keep the buildings insured against loss by fire, as herein agreed, or fails to pay the expense of effecting such insurance when due, or shall fail to keep, observe, or perform any condition of said lease by the lessee to be kept, observed and performed, then and in every such event the trustee may, and upon a requisition in writing signed by the holders of not less than one third in amount of said bonds then outstanding, and upon adequate indemnity," etc., furnished, "it shall be the duty of the trustee . . . to enter upon all and singular the said property, . . . and to exclude the mortgagor and its agents (who shall forthwith surrender the same to the trustee) wholly therefrom, and to have, hold, manage, control, and use the same, . . . and exercise all rights and privileges pertaining thereto, and from time to time, and at the expense of the trust estate, effect such insurance against loss by fire, make all repairs and replacements and alterations, additions, and improvements thereto, as may seem to him necessary or judicious, and to collect and receive all income, rents, issues, and profits of the same, and of every part thereof; and to apply the moneys arising as aforesaid to the payment, first, of all rentals, insurance, taxes, and other charges to be paid by the said lessee in said lease; second, the cost of repairing, rebuilding, and replacing and altering said building and operating and caring for said property; third, a commission of three per cent. of the rentals collected

to the trustee for his services, to be computed monthly; fourth, to set aside and retain as a sinking fund to pay semi-annual interest on said bonds and coupons, and to pay the principal of said bonds, all of the remainder of the moneys so received by the trustee, and apply the sums retained as far as they will extend in the payment of the semi-annual interest on said bonds and coupons, and then on the principal of the bonds which may be at that time due and unpaid," etc.

Article 4 of the trust deed or mortgage authorizes the trustee, in case the mortgagor fails to keep the buildings insured against loss by fire as provided for in said mortgage, or in case it fails to keep and perform any of the conditions of said lease, to elect and to declare the whole amount of the principal of said bonds to become due and payable, and that upon the exercise of such election the whole amount of the principal of such bonds shall become immediately due and payable; and article 6 of said trust deed or mortgage authorizes the trustee, in the event of default in the payment of any of the principal of any of the bonds when the same shall become due and payable, or in the event of a failure on the part of the said *Real Estate Company* to perform any of the conditions of said trust deed or mortgage after having exercised his option or privilege to declare the whole amount of the principal of said bonds due, to commence and prosecute an action of foreclosure.

Said trust deed or mortgage also contains a provision authorizing the trustee, after entry upon conditions broken, to sell the mortgaged property in accordance with the terms and provisions of said trust deed.

Pursuant to the provisions of said ninety-nine-year lease the *Real Estate Company* proceeded to and did erect and construct upon said leasehold estate a substantial building, four stories in height, it being its object and design to lease said building to tenants for stores and offices.

In the year 1914 the defendant *Berlin Arcade Theater Company* (hereinafter referred to as "*Theater Company*")

was organized as a corporation for the purpose of leasing and operating as a theater a portion of the building belonging to the *Real Estate Company* and situated upon said leasehold estate; and one Hugo Heller, one of the organizers and promoters of the *Theater Company,* and one Frank P. Burke, an attorney for the *Theater Company,* entered into negotiations with the *Real Estate Company* for a fifteen-year lease of a part of the *Real Estate Company's* building for theater purposes, and examined the records of the office of the register of deeds with respect to the title of the property of the *Real Estate Company;* and upon such examination discovered and were informed of said trust deed or mortgages and the terms and conditions thereof, and thereafter had an interview with *Schroeder,* the trustee for the mortgage bondholders. These representatives of the *Theater Company* personally saw *Mr. Schroeder,* the trustee, on two or three different occasions before the lease to the *Theater Company* was negotiated and executed, and discussed with him the general terms and conditions of the lease and also the matter of making certain alterations, etc., in the building, which, among other things, consisted in converting a certain arcade, running from Third street through to North avenue, into a theater lobby, and to convert the rear portion of a store fronting on Third street into an auditorium for a theater. Among other work contemplated by said representatives of the *Theater Company* was the taking out of the stores that were on the inside of the arcade, to be used for the purposes of a theater, and also the raising of the ceilings and lowering of the floors.

Upon an oral discussion with *Mr. Schroeder* by both Mr. Burke and Mr. Heller of the terms of the proposed lease with the *Real Estate Company,* the trustee, *Schroeder,* expressed his satisfaction with such lease and also with respect to the proposed changes to be made in the building, so that the *Theater Company* might be properly accommodated and

housed. The rents to be paid by the *Theater Company* were also discussed and were approved by the trustee, *Schroeder*. The sum of about $3,000 was paid by the *Theater Company* to the trustee, out of which money part of the improvements to be made for the benefit of the *Theater Company* were to be paid. Furthermore, certain deposits were to be and were made by the *Theater Company* with *Schroeder*, the trustee, in order that such improvements might be paid for out of such fund and so as to avoid the possibility of the filing of liens on the building.

Before the lease was drawn *Schroeder* also suggested that there be incorporated therein certain conditions with respect to insurance, in order to protect parties interested from damages for personal injuries received by persons in the theater and during building operations.

After the lease had been prepared a request was made by the representatives of the *Theater Company* of *Mr. Schroeder* as trustee to sign the same, but he refused to comply with this request.

The contemplated changes in the building to accommodate the theater were made at an expense of about $15,000.

At the time of the execution of the lease with the *Theater Company* there had been no default by the mortgagor of the terms and conditions of the said mortgages, and the *Real Estate Company* was in possession of the premises.

About the time of the execution of the lease with the *Theater Company* the *Real Estate Company* assigned and transferred to *Edward Schroeder* the rents accruing from the said lease, and notice of such assignment was given in writing by the *Real Estate Company* to the *Theater Company* on or about the 15th day of September, 1914; and on the 9th day of December, 1914, *Schroeder* notified in writing the *Theater Company* of the assignment of the rentals from the *Theater Company* to him and requested that payments of rent be made to him, the said *Schroeder*.

On or about the 2d day of October, 1916, default having

been made by the *Real Estate Company* in the payment of interest on the bonds and taxes on the real estate, and on account of failure to meet the terms of the ninety-nine-year lease, the said *Schroeder,* as trustee for bondholders, caused to be served upon the said *Real Estate Company* a notice in writing, under and by the terms whereof, on account of the defaults above referred to and pursuant to the provisions of the first trust deed or mortgage, he elected to declare, and declared, the whole amount of the principal sum of said first-mortgage bonds, together with the interest thereon, as due, and demanded immediate payment thereof, and also notified said *Real Estate Company* that in the event of a failure to comply with said request for payment forthwith an action would be begun to foreclose said first trust deed or mortgage.

Pursuant to the provisions of said trust deed or mortgage and on account of the default of the mortgagor, the plaintiff *Schroeder,* as such trustee under the first trust deed or mortgage, entered upon and took possession of the property of the said *Real Estate Company,* and thereupon and thereafter collected all the rents accruing from said property and did all things which he was authorized to do under and pursuant to said first trust deed or mortgage.

Foreclosure action in behalf of the trustee was thereupon commenced on the first trust deed or mortgage, and judgment demanded that any right, title, or interest that the defendant *Theater Company* had in and to said property by virtue of said fifteen-year lease be declared subsequent to the lien of the plaintiff as trustee under said first mortgage or trust deed. The defendant *Leidig,* as trustee under said second trust deed or mortgage, filed a cross-complaint, in and by which he prayed for judgment in his behalf and demanded substantially the same relief with respect to his said trust deed or mortgage as was prayed for by the plaintiff herein.

The defendants *Esbenshade,* as executrix, and *Hummel*

and *Leafgreen,* holders of second-mortgage bonds under said second trust deed or mortgage, were also made parties defendant to said foreclosure action, as was also one *Floyd E. Jenkins* as receiver of the defendant *Real Estate Company.*

The *Theater Company* answered, and among other things alleged that the *Real Estate Company* owned the building situated upon the leased premises herein referred to and the leasehold interest in the land, and owned no other property; that it was organized for the purpose of taking over said building and leasehold interest; that the building was a three-story building, designed for stores, offices, and a theater, and was not designed so that the whole building could be used by a single tenant; that the plaintiff knew that it would be necessary for the *Real Estate Company* to enter into leases with divers persons on various terms, so that it could pay its taxes, insurance, interest, rent, and the upkeep of the mortgaged premises; that the trust deed on which the plaintiff was foreclosing, and also the second trust deed, provided that, until default should be made and continued by the mortgagor, the mortgagor should be permitted to possess, manage, use, and enjoy the property and the improvements as if the said trust deed had not been made; that at the time the lease was entered into with the *Theater Company* the *Real Estate Company* was not in default and was still in possession of the mortgaged premises; that the *Theater Company* submitted the proposed lease to *Schroeder* as trustee, and was assured that said lease was in all respects satisfactory to such trustee, and that by reason of the actions of the plaintiff and his approval of said lease he was estopped to deny the validity of said lease.

By stipulation of the parties the issues raised by the plaintiff's complaint, the answer of the defendant *Leidig* as trustee under the second-mortgage bonds, and the answer of the defendant *Theater Company* were tried separately.

Upon the issues so raised by the *Theater Company* the facts above stated were substantially disclosed, and after such hearing the circuit court made and filed, among others, the following findings, to wit:

The court found that the *Real Estate Company* executed the bonds pertaining to the first trust deed or mortgage, and also the execution of the first trust deed or mortgage, and delivery of said first-mortgage bonds and of said first mortgage or trust deed to said plaintiff, *Schroeder,* as trustee; the acceptance by said *Schroeder* as such trustee; the sale and delivery of said bonds by said plaintiff, *Schroeder,* as such trustee, for the use and benefit of the *Real Estate Company;* that all of the first-mortgage bonds are outstanding and held and owned by persons other than the trustee and are wholly unpaid as to principal; that the said defendant *Real Estate Company* defaulted in the payment of taxes on said property and also in the payment of interest on said bonds; that pursuant to the provisions of said first trust deed or mortgage the plaintiff, on October 4, 1916, declared the whole amount of the principal and interest on said bonds as due and demanded immediate payment thereof, and that such demand was not complied with; and that upon such declaration of election of option and the service thereof the whole amount of the principal of said first-mortgage bonds, namely, the sum of $125,000 and interest, became due; and that this action to foreclose was commenced on or about the 11th day of October, 1916.

That on the 11th day of October, 1916, the plaintiff, as trustee, with the consent of the mortgagors and under the provisions of said first trust deed or mortgage, entered into possession of the mortgaged premises to conserve the same as security for the bondholders, collected the rents thereof, and used the same towards a reduction of the taxes and interest becoming due on the bonds; and that he retained and now retains possession of said premises.

The court also found the execution of the lease by the

Real Estate Company with the *Theater Company,* as above stated; that at the time said lease was executed there had been no default by the mortgagor; that the *Real Estate Company* was at that time in possession of the premises; and that said *Edward Schroeder* did not at that time, as such trustee, take possession of said premises.

That prior to the time the *Theater Company* entered into said lease its officers and representatives consulted with the said *Schroeder,* as trustee, and advised him of their intention of leasing a part of the premises in question for a period of fifteen years, and that it would be necessary to expend a large sum of money in order to change and remodel said building so that it would become suitable for theater purposes; that the said *Schroeder,* as trustee, expressed his satisfaction with the general outline of the proposed lease, but refused to give his consent in writing to the making of such lease, and that thereafter said lease was actually executed; and that the *Theater Company* proceeded to change and remodel the building for theater purposes at an expense of about $15,000; that said plaintiff, as trustee of both the first and second trust deeds or mortgages, did nothing which in any way interfered with the rights of the bondholders; and that it does not appear from the evidence that the plaintiff is estopped to assert the priority of the lien of said trust deeds or mortgages over the rights of said defendant *Theater Company* as lessee; and that the rights of the *Theater Company* are subsequent and subordinate to said two trust deeds or mortgages; and that the interests of all of the defendants are subsequent to the lien of the first mortgage.

Similar findings were thereupon also made by the court with respect to the second mortgage or trust deed. Also that the *Real Estate Company* is wholly insolvent; that eighty-one of the one hundred second-mortgage bonds were duly issued and sold by the *Real Estate Company.*

With respect to the issues so raised and pursuant to the findings of fact, and as conclusions of law, the court found that the plaintiff was entitled to the relief demanded in the complaint; that the defendant *Theater Company* was not entitled to any relief; that the plaintiff, and defendant *Leidig* as trustee under said second trust deed or mortgage, were entitled to judgment of foreclosure and sale in the usual form, and thereupon judgment was entered in accordance with such findings; from which judgment the *Theater Company* has appealed.

The issue presented on the appeal of the *Theater Company* involves substantially the following:

Question No. 1. Is the lease from the *Real Estate Company* to the *Theater Company* subject and subordinate to the first and second mortgages or trust deeds, and did the circuit court properly adjudge that the premises be sold free and clear of such lease?

It will be unnecessary in detail to go into the various answers of the defendants *Esbenshade, Hummel, Leafgreen, Jenkins* as receiver, or the *Real Estate Company,* for the reason that in substance the same issues are raised in somewhat different form by these respective answers. Among other things they allege that there was in fact no default on the bonds at the time of the commencement of the action; that the moneys received from the sale of the bonds and the rentals derived from the property and paid to the plaintiff, *Schroeder,* were sufficient to pay all necessary requirements and demands; that the plaintiff, *Schroeder,* collected from the sale of said bonds a large amount of money, aggregating a sum in excess of $20,000, which amount he applied to his own personal use and which amount he has failed to account for; that he, the said *Schroeder,* expended a large sum of money, aggregating the sum of about $8,000, being his own individual funds, for the installation of a bowling alley in said premises, all without authority and contrary to his du-

ties and obligations as trustee, and that in order to reimburse himself in part for such expenditures he used the moneys derived from said property and said bonds.

And it is further alleged that at the time of the purchase by *Hummel, Esbenshade,* and *Leafgreen* of the second-mortgage bonds held by them, it was represented to them by said *Schroeder* that all of the moneys derived by said plaintiff, *Schroeder,* from the sale of said first and second-mortgage bonds would be used in the erection and construction of the building to be erected upon the premises hereinbefore described and for no other purpose; and that a large amount of such money so derived from the sale of such bonds was converted by said *Schroeder* to his own individual use, to the great damage of the said second-mortgage bondholders and of said *Real Estate Company.*

Also that said *Schroeder,* as such trustee, in taking over the collection of rentals and in leasing the said building, was negligent in the execution of his trust, and by reason of such negligence such defendants sustained large damages.

The answers of these defendants also demanded an accounting that the plaintiff, as trustee for the first-mortgage bondholders, be required to exhaust all property and security to which he may be entitled by virtue of the alleged misappropriation of funds by the said *Edward Schroeder* before resorting to the mortgaged property; and for an accounting by the plaintiff of all moneys received by him as such trustee for rents collected and from other sources; and that the amounts found due from him be applied upon the amounts due upon the bonds secured by the first and second trust deeds or mortgages in such manner as may be just and equitable; and for judgment against the said plaintiff for the amounts unaccounted for by him, and for damages for his negligence as aforesaid, etc.

The foregoing does not set forth all of the claims of the respective defendants above referred to in regard to the

alleged mismanagement and misconduct, etc., of the said *Schroeder,* but the allegations are sufficient to show the general nature of such allegations and the relief demanded. Other issues raised will be referred to and treated in the opinion.

After the trial had proceeded for about two weeks an application was made by the defendants to implead the said *Edward Schroeder* individually, and testimony was ostensibly offered for the purpose of substantiating such allegations of misconduct, mismanagement, and misappropriation, and the court refused to implead said *Edward Schroeder* individually and to permit testimony to be received or introduced in proof of such allegations.

The principal question, therefore, arising and submitted to the court with respect to the answers of the defendants, other than the *Theater Company,* is substantially involved in the following:

Question No. 2. Did the court properly refuse to implead *Edward Schroeder* individually, to determine whether or not he is personally liable to any of the parties to the action?

For the *Arcade Theater Company* there were briefs by *Alexander & Burke,* attorneys, and *Bottum, Bottum, Hudnall & Lecher,* of counsel, all of Milwaukee; and the cause was argued orally by *George B. Hudnall* and *Frank P. Burke.*

For the *Berlin Arcade Real Estate Company* and others there were briefs by *Joseph G. Hirschberg* and *Horace B. Walmsley,* both of Milwaukee, and oral argument by *Mr. Walmsley.*

For *Leonard Leidig,* trustee, and others, there was a brief by *Glicksman, Gold & Corrigan* and *George A. Affeldt,* all of Milwaukee, and oral argument by *Walter L. Gold.*

J. O. Carbys, attorney, and *Lawrence A. Olwell,* of counsel, both of Milwaukee, for *Edward Schroeder,* trustee.

The following opinion was filed July 13, 1921:

Doerfler, J. We will first take up the issue raised by the answer of the *Theater Company* and as contained in question No. 1 set forth in the preceding statement of facts.

A deed of trust in this state is a mere security for money advanced under the bond issue, and in legal effect is nothing more than a mortgage. *Hoyt v. Fass,* 64 Wis. 273, 279, 25 N. W. 45. In fact, in the instant case, the trust deeds are characterized as mortgages.

It has been held in this state that the title remains in the mortgagor, and the mortgagee holds the mortgage as such, as mere security for the debt. So stringent is this rule that it has often been held by this court that a deed in fee simple absolute, given merely to secure a debt, with a parol defeasance, is nothing more nor less than a mortgage, leaving the title in the grantor and giving to the grantee a mere security for his debt, to be enforced like an ordinary mortgage (*Schriber v. LeClair,* 66 Wis. 579, 586, 29 N. W. 570, 889; *Wis. Cent. R. Co. v. Wis. River L. Co.* 71 Wis. 94, 36 N. W. 837; *Central Trust Co. v. Burton,* 74 Wis. 329, 43 N. W. 141); also that the right of the mortgagee who has got peaceable possession of the premises after condition broken, to retain them until his debt is paid, is founded upon his equitable right to be paid without being put to the cost of a suit, and not upon any title in him. *Brinkman v. Jones,* 44 Wis. 498, 512.

"By the common law, at first, mortgages became absolute deeds, if the terms of the defeasance were not strictly performed on the day; but courts of equity succeeded in establishing an equity of redemption of the mortgagor in the land, which remained an equity in him until the mortgage was duly foreclosed by process of law. Courts were astute in protecting this equity of redemption, and leaned strongly against all agreements between the mortgagor and mortgagee which abridged it. 'Once a mortgage always a mortgage' became a maxim. Therefore, when provisions began to be inserted in deeds which enabled the mortgagee to de-

stroy at once this equity of redemption, courts looked upon them with suspicion, if not with aversion, as devices intended to oppress and injure mortgagors, who are, from the nature of the case, more or less in the power of mortgagees. But, notwithstanding all opposition, the use of trust deeds has steadily increased, until they are common in England and in nearly all the states. They are regulated by statutes, and are under the jurisdiction of courts of equity, which can interfere, by injunctions, prohibitions, orders, and decrees, to prevent oppression and remedy abuses. A large proportion of the mortgage deeds of real estate now contain powers of sale in case of default, and the laws regulate and protect them." 2 Perry, Trusts, § 602*c*.

"Especially until condition broken, a trust deed does not divest the estate of the mortgagor. He can convey the estate, subject to the mortgage; he may make a second mortgage; the estate may be attached for his debts; the mortgagor is considered as having all the rights and powers of an owner, except so far as it is necessary to hold otherwise in order to give effect to the mortgage. The interest of the mortgagor may be levied upon and seizin delivered by the officer; in which case the creditor will hold in fee, subject to the mortgage. The same principles apply to the rights and title of the grantor in deeds of trust." 2 Perry, Trusts, § 602*j*.

The foregoing statements are made under the authorities cited to show the legal effect of the execution of a trust deed in this state with respect to the interests of the mortgagor and the mortgagee.

Trust deeds, particularly in recent years, have become a very popular security in this state, and but few large mortgages are now executed excepting they are in the form of a trust deed. In fact, this can be considered the age of trust deeds in this state as elsewhere, and hardly a day passes during the present period of economic readjustment but we read or hear of the flotation of a large bond issue in railroad, industrial, real estate, or other enterprises, and a very large percentage of the securities held by the people at large who make such investments for economic purposes are in the form of bonds secured by trust deeds executed to trustees.

It has also become a matter of common knowledge that at the present time, where as one of the results of the great war housing conditions have become very oppressive and facilities to furnish homes for the masses have become scarce, and where office space for professional men and others is at a great demand, and where rentals have been raised by landlords in many instances far in excess of the requirements of the situation, numerous corporations and individuals have become interested and engaged in the erection of tenement, apartment, and office buildings intended to house and accommodate a vast number of our population in need of such accommodations, and corporations have also sprung up, actuated by a spirit of civic pride and righteousness, to build homes to be leased to the masses, and in almost every instance the moneys are raised by the flotation of large bond issues; and these facts have been recognized in a large measure by statutes in our state, which authorize the issuance, regulation, and sale of these bonds under the supervision and authority of public bodies such as the railroad and insurance commissions of the state. These bonds are purchased by trust companies, bond and stock brokers, and other similar institutions and individuals, and are resold in a large measure to the rank and file of the people, who invest in the same in accordance with their means.

It is true that the issuance of bonds and the execution of trust deeds is of comparatively recent origin and that the growth of this practice has kept pace in a large measure with the enormous expansion of our commercial and industrial interests. Bond issues are to be encouraged rather than discouraged, for they afford an opportunity for frugal investors and the people at large to invest their savings in remunerative and successful enterprises and bring in closer contact the investors, who in a large degree are employees, with the institutions by whom they are employed, and so have a tendency to bring about a mutuality of interest and a better understanding between employers and employees generally.

From what has preceded it will readily be seen that the

question as to whether a mortgage in the form of a trust deed, when once executed, shall continue to be a fixed lien and hold its place as a first or second mortgage in accordance with the date of its execution and recording, becomes a matter of great importance not only to the investor but also to the borrower. To a large extent the salability of the bond issue depends upon the fixed and unshakable security of the trust deed, which is of prime importance to the investor. To the borrower this same consideration becomes of great importance, for upon the existence thereof depends his ability to float the bonds and to raise the necessary money for the purpose of which the bond issue has been designed. Therefore the general rule has been evolved, and is a fixed one in contemplation of law, that a fixed legal right under a mortgage cannot be impaired by any equity subsequently arising, although there is an apparent exception to this rule in the case of operating expenses, having practical application with respect to railroads, and also one pertaining to employees, who are frequently given preferred claims by statutes. 2 Elliott, Railroads, § 500.

And it is held that

"The priority of a first mortgage is not affected by the fact that the road was completed or part of it wholly built by money obtained by means of a junior mortgage, nor are unsecured claims of contractors or materialmen who have furnished money or material for building or repairing it entitled to priority over a prior mortgage." 2 Elliott, Railroads, § 500.

"And a mortgage trustee has no power to agree that an unsecured debt or a subsequent mortgage debt shall be paid in preference to the first-mortgage bonds." 2 Elliott, Railroads, § 500; *Duncan v. Mobile & O. R. Co.* 2 Woods (U. S. C. C.) 542; *Hollister v. Stewart*, 111 N. Y. 644, 19 N. E. 782; *Colorado & S. R. Co. v. Blair*, 214 N. Y. 497, 108 N. E. 840.

"A trustee has no authority to waive defaults or otherwise deprive bondholders of their rights." *Hollister v. Stewart, supra.*

Thus it will be seen from the citations and authorities that

the courts have carefully guarded and protected the interests of bondholders secured by a mortgage or trust deed, and have generally and quite universally accorded them the priority which was originally contemplated by the issuance of such bonds and the execution of such trust deeds or mortgages.

The floating of a bond issue is generally accompanied with the issuance of a prospectus, by which the investors are fully apprised of the nature of the security offered, the location and value of the property intended to be mortgaged, the object and purpose of the erection and construction of the building or buildings, the rental value of the building, the industry or business project to be accommodated by the erection of the building, and many other incidental facts involved in the matter of the security of the proposed bond issue.

In a vast number of these bond issues the property which it is intended shall form the basis of the security consists of buildings designed to be leased in whole or in part for manufacturing purposes, for tenements, for office and for commercial purposes.

In the instant case the building known as the Berlin Arcade Building was originally designed to be used for office and store purposes, and in fact the building was erected for that purpose, and the bonds were issued and negotiated in order to furnish a fund out of which to pay for the building to be used for that purpose, and for no other purpose.

It is also true that the investors in these bonds had in view this purpose for which this building was to be used, the location of the building, the construction of the same, and the rentals to be derived from the building, all of which elements, to a large degree, formed the basis upon which the value of the property was fixed and determined and the security of the bond issue estimated. If there was one thing over and above all others that investors in these bonds had in mind, whether they invested in the first-mortgage bonds

or in the second-mortgage bonds, it was the fact that the investment and the lien constituted by the respective trust deeds or mortgages would be and would constitute a fixed lien or security which could be defeated only by such considerations as arise by virtue of the terms of the trust deed or the law; as, for instance, unpaid taxes or failure to pay or meet the obligations under the ninety-nine-year lease, with respect to rentals thereunder or other obligations assumed thereby.

The trustee, under the provisions of the trust deed, in some respects represents the bondholders, in other respects the mortgagor, and in still other respects both bondholders and mortgagor.

"The powers of trustees under deeds of trust, and of mortgagees under mortgages with power of sale, depend entirely upon the terms of the deeds. Such powers are created by and exist in the deeds, and of course they exist in the terms in which they are created, and in no others. They are to be exercised by the trustees *in pais*. They are wholly matters of convention and contract between the parties, and not of law or jurisdiction. They can be exercised because they are conferred by one party upon another, and not because the law or the courts have conferred or authorized them. The statutes in some of the states have regulated their execution, but such statutes do not create the powers themselves." 2 Perry, Trusts, § 602*g*.

"The trustee, or mortgagee with the power of sale, holds the lands in trust for the purposes for which the trust deeds are made, which purposes are generally specified in the deeds thereof." 2 Perry, Trusts, § 602*l*.

A further legal doctrine must be borne in mind, and that is that the provisions of a mortgage are not personal to the party named in it as mortgagee, but are for the benefit and security of the real owner of the debt secured thereby. 27 Cyc. 1045, and note 56.

So that from the foregoing it becomes quite clear that in order to ascertain and determine the rights of a trustee under a trust deed or mortgage it is necessary to look to and

examine closely the provisions of the trust deed, for under such trust deed there is created not only the very office of the trustee but also his various duties, obligations, and powers.

The bonds and the interest thereon are made payable to the trustee, who for that purpose is constituted the agent to receive the money and to distribute it among the bondholders upon presentation of the bonds or the interest coupons. As has been said in *Cvnnell v. Kaukauna,* 164 Wis. 471, 496, 159 N. W. 927, 160 N. W. 1035:

"The authority of the trustee to act for the bondholders is prescribed and limited by the terms of the trust deed, and a payment to the trustee merely as trustee cannot be held to be payment to the bondholders, unless made when and as prescribed by the terms of the bond." *Miller v. Mitchell,* 58 W. Va. 431, 52 S. E. 478; *Kransz v. Uedelhofen,* 193 Ill. 477, 62 N. E. 239; *Fortune v. Stockton,* 182 Ill. 454, 55 N. E. 367; *Schroeder v. Wolf,* 227 Ill. 133, 81 N. E. 13.

The bonds may be registered as to the payment of principal upon the books of the trustee, and in performing the office of registrar the trustee represents both the mortgagor and the bondholders.

In the event that the building upon the premises is destroyed by fire the insurance moneys shall be paid to the trustee, and the trustee shall thereupon hold said sum so derived from insurance and pay the same to various contractors, materialmen, and laborers in accordance with the certificates of the architect of the building, and in doing this the trustee represents both the interests of the mortgagor and of the mortgagee.

In the event of the failure of the mortgagor to keep the buildings properly insured, or in the event of his failure to pay the taxes or in any other respect to comply with the provisions of the trust deed, the trustee, under certain circumstances, shall have the right to declare the whole amount of the mortgage debt, both principal and interest, due, and

to foreclose the trust deed or mortgage, and with respect to this provision the trustee represents the bondholders. He is also authorized, upon conditions broken, to enter into and upon the premises and to possess the same, and thereafter collect the rents, issues, and profits derived from the building, and in that regard he is the representative both of the mortgagor and of the bondholders.

In the event of the failure of the mortgagor to pay the rent due upon the ninety-nine-year lease or to pay the taxes upon the property, the trustee is authorized, under the terms of the trust deed, to pay such rent and to pay the taxes in order to save and protect both the interests of the mortgagor and the bondholders.

The trustee may also raise and borrow money on the security of the mortgage lease and premises, or upon any sublease, for the purpose of paying off any sum due for interest, rental, insurance, taxes, or other charges payable by the lessee under the ninety-nine-year lease, and in doing this he acts both as the representative of the bondholders and of the mortgagor in order to protect the mortgaged property from forfeiture under the terms of the lease.

And upon conditions broken, if the trustee takes possession of the mortgaged property, under the terms of the trust deed he is authorized first to sell the real estate; second, to apply so much of the proceeds of the sale as is necessary to the payment of the debts secured by the deeds; and third, to account for and pay over the balance, after paying the expenses of the trust and the sale, to the grantor or mortgagor, his legal representatives or assigns.

The foregoing are but a few of the rights, powers, duties, and privileges of the trustee as defined by the trust deed, and they tend to show the appreciation on the part of the contracting parties of what it was intended to make clear by the foregoing, that the creation of such rights, powers, duties, and privileges depends upon the trust instrument.

The delicate position in which a trustee, therefore, is placed by the trust deed, in and by which he is required and obligated to act in a dual capacity, also becomes clear, and in the execution of his obligations and powers under the law it is incumbent upon him to use the utmost good faith towards all parties in interest. He must act impartially for every person who has any rights in the estate. 2 Perry, Trusts, § 602*o*.

In vain do we search through the provisions of these trust deeds to find any authority vested in the trustee to enter into any lease with a tenant or tenants of the building, or to ratify or confirm any lease, or to consent to any lease, either orally or in writing, before conditions broken.

It is true that upon conditions broken on the part of the mortgagor an entirely different situation arises. Under the terms of the trust deed the mortgagor is then authorized to enter into and upon the mortgaged premises, take possession of the same, manage and control the same, recognize, make, or alter leases, or to enter into any agreements within the purview of the trust deed the situation may demand.

While it is a fact that under the provisions of the first paragraph of the trust deed proper the mortgagor conveys and assigns to the trustee, etc., all its right, title, and interest in, to, and under said lease (meaning said ninety-nine-year lease) and to any and all future income, rents, and revenue from the lease and leased property and any part thereof, such assignment and transfer is intended to be made effective only in the event of conditions broken, for a subsequent provision of the lease expressly provides that until default shall be made and continued by the mortgagor in the payment of the principal and interest of any of the bonds secured by the trust deed, or until default shall be made and continued in respect to some act, thing, obligation, or agreement required to be done, performed, or kept by the mortgagor as in said lease provided, the mortgagor shall be permitted to possess, manage, use, and enjoy the said mort-

gaged property and the improvements, appurtenances, rights, and privileges, and to take and use the incomes, revenues, rents, and profits thereof, as if the mortgage had not been made. Furthermore, it must be conceded that the trust deed does not in express terms, before conditions broken, authorize the trustee to lease any of the property covered by the ninety-nine-year lease, or the buildings thereon, or to accept or demand an assignment of the ninety-nine-year lease, or of any of the subleases, or of the rents, issues, and profits derived from any of said leases, excepting only in so far as he is authorized to act in order to prevent a forfeiture of the ninety-nine-year lease pursuant to conditions broken by the mortgagor of the terms of said lease.

We now come to the lease executed by the *Real Estate Company* to the *Theater Company*. This lease contemplated structural changes in the building of the *Real Estate Company*. The walls of the building were to be removed, ceilings raised, floors lowered, entrances changed, and other material and structural changes were contemplated. It was therefore an act of wise precaution on the part of the representatives of the *Theater Company* to confer with the trustee in order to fully present to him the plans in detail with respect to such contemplated changes. Such conferences were held, and, it appearing to the satisfaction of the trustee that such changes would not be detrimental to the interests of the bondholders, he expressed his satisfaction with respect thereto. The terms of the proposed lease were also submitted to the trustee, and he examined the same and found no objections thereto, and expressed his satisfaction therewith. The bondholders were vitally interested in having no changes made in the building of a structural nature that would endanger the stability of the building, for had the building been endangered by reason of such changes the same would have constituted waste and would have vitally and materially affected the interests of bondholders. Every effort was made on the part of the representatives of the

Theater Company to obtain the written consent of the trustee to this new lease with the *Theater Company*. Such consent was refused, indicative strongly of the position which is made apparent on the part of the trustee that he did not intend to bind himself as trustee, or the interests of the bondholders, to said lease. In fact, it is difficult to conceive of any situation or circumstance which would make the trustee's position as he made it manifest, clearer than was done by his refusal to either join in the lease or to give his written approval or consent to the document. Had he done so, he would nevertheless have failed to bind the interests of the bondholders, for the reason that his authority vests almost exclusively in the provisions of the trust deed, and, no such authority having been granted or vested in him, the interests of the bondholders could not have been bound.

A careful examination of the lease with the *Theater Company* will disclose the fact that it contains no provision whatsoever intended to bind the bondholders or even the trustee. It must also be borne in mind that at the time of the execution of the lease with the *Theater Company* there had been no default by the mortgagor of the conditions of the mortgages and that the *Real Estate Company* was in possession of the premises.

The evidence does not disclose, nor has the claim been made, that any of the bondholders at any time had any knowledge whatsoever of the proposed execution of said *Theater Company* lease; nor is there any evidence or claim that such bondholders were notified thereof subsequently, so as to lay the possible foundation on the part of such bondholders to a ratification or confirmation of such lease. True, the trustee, upon the execution of the lease with the *Theater Company*, received a large amount of money, aggregating about $15,000, which amount he disbursed to contractors and others engaged in the making of the necessary changes in the building to accommodate the theater. In making

these disbursements the trustee acted primarily in the interests of the mortgagor, as is made evident by the fact that the object and purpose of placing this money in the trustee's hands for disbursement was to provent the filing of liens and the incumbering of the mortgagor's interests. The mortgagee's interest could not have been affected by the filing of contractors', materialmen's, or laborers' liens. A bond was also executed to protect persons on the premises from personal injury during the construction of the theater and to also protect occupants of the theater. The execution of this bond was suggested by the trustee and was solely for the benefit of the mortgagor and of the *Theater Company*. So that it must have appeared to the bondholders, at the time of the execution of the *Theater Company* lease, that the property was in the possession of the *Real Estate Company*. The bondholders had no notice of the lease or of any changes with respect to the collection of the rents and of the proposed alterations in the building. There is nothing in the situation which justified any alarm on the part of the bondholders. Every one is familiar with the floating of bond issues of the nature of the one in question. These bonds are sold to numerous persons, who look for their security to the mortgaged property. Bondholders as a rule do not interest themselves in the collection of rents, and first become apprehensive when a default occurs in the payment of principal or interest. So that it is readily deducible from the foregoing:

1. That no authority was vested in the trustee to subject the interests of the bondholders to the *Theater Company* lease.

2. That the bondholders had no knowledge of the changes in the building designed to accommodate the *Theater Company*.

3. That the bondholders had no knowledge of the assignment of the rentals of the Berlin Arcade Building.

4. That they did not ratify or confirm said lease so as to subject their security to said lease.

So that the findings of the circuit court, wherein it substantially found that the matters and things the trustee did with respect to the lease of the *Theater Company* were not done for the purpose of jeopardizing the lien of the bondholders, and that the lease of the *Theater Company* did not become a prior lien to the lien of the bondholders, are well sustained by the evidence and by all the surrounding facts and circumstances in the case.

It is claimed by counsel for the *Theater Company* that under the rule as laid down in 16 Ruling Case Law, p. 599, § 77, and cited in Jones, Mortgages (5th ed.) § 782: "Though the general rule is that a subsequent lessee of mortgaged property, taking under a lease from the mortgagor, takes subject to the mortgage, yet where the mortgage, in express terms or by clear implication, authorized the mortgagor to make leases for the benefit of the mortgagee, a lease made in pursuance of such authority is binding on the mortgagee and those claiming under him," the lease to the *Theater Company* was such a lease as was contemplated by the parties to the trust deed to be made by the mortgagor for the benefit of the mortgagee, and is therefore binding upon the mortgagee, and subjects his security to the prior rights of the lease.

The doctrine as above stated, and contained in Ruling Case Law and in Jones on Mortgages, is founded principally upon the decision in the case of *Sammons v. Kearney P. & I. Co.* 77 Neb. 580, 110 N. W. 308, 8 L. R. A. N. S. 404.

A careful examination of the facts in the *Sammons Case* will reveal a radical distinction or difference between that case and the instant case. In the *Sammons Case* the plaintiff appealed from a decree of the lower court in an action brought to foreclose a mortgage, by which decree the plaintiff's mortgage lien was made subject to a certain lease or contract executed by the mortgagor to the defendant, North-

western Electric Heat & Power Company. It appears that the general nature of the business of the defendant Kearney Power & Irrigation Company is the owning, constructing, and operating of canals, reservoirs, dams, and other works for irrigation and water-power purposes, including the power to lease its own property and to acquire by purchase such canals, reservoirs, and other works for irrigation and water-power purposes, including the power to execute mortgages or deeds of trust to secure such bonds as may or shall be issued by the company in furtherance of the objects of its incorporation. On the 15th day of July, 1898, the defendant Kearney Company executed and delivered to a trustee a mortgage on certain of its property and rights to secure a bond issue of $150,000 in bonds of $500 each. On the 1st day of November, 1899, the mortgagor entered into a contract in writing with the Northwestern Electric Heat & Power Company, whereby, for a consideration therein named, the latter was given the right to take water from the canal in question for a period of fifteen years, with the privilege of a renewal of the contract on the same terms for an additional fifteen years, for the purpose of furnishing power for its electrical machinery. Default was made in the payment of the interest on the bonds, and on the 9th day of September, 1903, Sammons, who was the owner and holder of 239 of the 274 bonds disposed of, brought an action to foreclose the mortgage. The Northwestern Electric Heat & Power Company was permitted to intervene and settle its rights under the contract with the defendant Kearney Power & Irrigation Company, the mortgagor. The court found in favor of the plaintiff and ordered a decree that the property should be sold subject to the rights of the intervener, Northwestern Electric Heat & Power Company, under its contract with the mortgagor, and that such contract should be binding upon the purchaser at such sale. From this decree of the lower court, ordering a sale of the mortgaged property subject to the contract of the North-

western Electric Heat & Power Company, the plaintiff Sammons appealed. On the appeal the principal question to be determined was: Did the court err in providing in the decree that the sale thereunder should be subject to the rights of the intervening company under its contract with the mortgagor? The court in its opinion first recites the general rule as heretofore stated, and then proceeds as follows:

"The foregoing rule is easily recognizable, as it is grounded on the general rule applicable to all mortgages that an interest subsequently acquired by a third party in the mortgaged property is subject to the mortgage; but the question is whether the facts in this case bring it within that rule."

In substance, the mortgage in the *Sammons Case,* among other things, covered, first, all the property of the mortgagor of every character; second, it was intended to cover not only such things in action, contracts, leases, claims, and demands as existed when the mortgage was given, but all such as the mortgagor might thereafter acquire; third, it also provided that all the things in action, contracts, leases, claims, and demands as the mortgagor might subsequently acquire, should be duly assigned to the mortgagee as further security for the mortgage debt.

In construing the trust deed and the contract above specified, the court in its opinion in the *Sammons Case* further said:

"But, when the construction of a contract becomes necessary, it is permissible to look beyond the language of the contract, and to take into account the nature of the subject matter, the condition and situation of the parties, and the facts and circumstances surrounding the transaction. The mortgagor was a corporation, and one of the purposes of its organization was to lease water rights. It was the owner of a plant, designed to serve that purpose, but which, as the record shows, yielded no revenue save such as might be derived from the sale or leasing of water rights. The bonds, by their terms, were made to run for a period of twenty

years, and the interest thereon is payable semi-annually. Now, taking into account these facts and circumstances in connection with those provisions of the mortgage hereinbefore set out, it is too clear to admit of argument that the parties to the mortgage at the time it was made, contemplated that the mortgagor's plant covered by the mortgage should be maintained as a going concern, because in no other way could it meet the interest on the bonds from time to time, to say nothing of the discharge of the principal debt when it became due."

The opinion further proceeds with the idea that at the time when these water rights were leased it was contemplated by the parties that the lessee would necessarily be obligated to expend a large amount of money in improvements for its business, and that the trust deed or mortgage contained a provision that, upon default of the mortgagor, the mortgagee could declare the whole amount of the bonds and interest due and payable and immediately commence foreclosure proceedings, and thus deprive the lessee of his investment, unless it be held that the mortgage when originally made contemplated the execution of these contracts and leases for the benefit of the mortgagee.

In the case at bar the trust deed was executed to run for a period of five years. It was contemplated at the time of the execution of such trust deed that at the end of this period there would be a refunding of the mortgage debt; so that it could not have been contemplated that during such period of five years the principal of the mortgage debt would be paid out of the rentals or profits of the building.

The five-year period of the trust deed in the instant case constituted an unusually short term for a bond issue of that kind, and was no longer than the usual period for which mortgages in considerably smaller amounts are executed. The very fact that the bond issue covered so short a period of time, in itself was indicative of the fact that the parties at the time of the execution thereof did not contemplate

subjecting this bond issue to the provisions of a long-term lease such as the *Theater Company* lease.

Furthermore, there is no provision contained in the trust deed or mortgage in the instant case whereby all the profits and rents derived from the leased property are to be paid and assigned to the mortgagee for his benefit. Under the trust deed in the instant case the mortgagor, until conditions broken, was to continue in the uninterrupted possession of the leased premises and enjoy the rents, issues, and profits thereof. On the other hand, in the *Sammons Case* all the property of the lessee or contractee, including leases, contracts, rentals, profits, etc., of every nature and description, was assigned and transferred to the mortgagee, and it does not appear, as far as the reading of the opinion in the case is concerned, that the mortgagor in the *Sammons Case* was entitled to possession and enjoyment of the mortgaged property, and of the rents, issues, and profits thereof, until conditions broken. Furthermore, in the *Sammons Case* the leases and the trust deed, respectively, covered terms which would expire at or about the same time, strongly indicative of an intention on the part of the parties to make the mortgage subject to the provisions of such lease. It is also clearly inferable from the provisions of the Sammons trust deed and lease or contract that it was contemplated by the parties that the principal amount of the trust deed would, during the period thereof, be fully paid by the rentals, issues, and profits derived from the lessees and others of the mortgaged property.

It also appears clearly that in the *Sammons Case,* where valuable water rights were leased, it was contemplated, in order to make use of the provisions of such lease, that the expenditure of a large sum of money would be necessary on the part of the lessee in order to obtain the full advantage of the leased rights. And above all things it appears from the *Sammons Case,* and is so stated in express language, that the facts and circumstances in connection with the pro-

visions named in the trust deed or mortgage are such that by necessary implication the parties to the mortgage at the time it was made contemplated that the mortgagor's plant covered by the mortgage should be maintained as a going concern for the benefit of the mortgagee.

It was not claimed in the *Sammons Case* that the mortgage gave express authority to the mortgagor to make the contract or lease under which the intervening company claimed superior rights to that of the mortgagor, but it was claimed that such rights followed from the terms of the trust deed or mortgage by necessary implication. And the court very rightly said in its decision in the *Sammons Case* that the solution of the question is to be found in the familiar rules of construction applicable to the facts in that case, rather than in precedents, resting as they must on instruments differing materially from that under consideration.

It is contended on the part of counsel for the *Theater Company* that injustice may be done to their client resulting from the investment of a large sum of money in the reconstruction of the building in order to accommodate the theater, which money to a large extent, under the decree as entered by the lower court, would constitute a loss. That fact is to be regretted, and it is also to be regretted that the proper officers of the *Theater Company* and of the *Real Estate Company* did not see fit to enter into an agreement wherein and whereby it would be stipulated that the mortgaged property was to be sold and bids invited, so that title might be conveyed either free from the lease or subject to the lease, in accordance with the bids received upon such sale. It is not too late now to enter into such a stipulation, and it would appear to us that the interests of all parties would be subserved thereby. However much we may sympathize with the *Theater Company* in its present deplorable condition, we nevertheless must also take into consideration the status of the bondholders and the rights which they contemplated at the time of the purchase of the bonds. Their

interests were first in point of time. It was always within the power and the province of the *Theater Company* and its officers to make a careful study and examination of the trust deeds in question and thereby reasonably satisfy themselves as to their rights thereunder. Such examination, from the evidence, has apparently been made by counsel for the *Theater Company*. Realizing the situation, the *Theater Company* saw fit to proceed with the expenditure of a large sum of money, notwithstanding the open and direct refusal of the trustee to join in the *Theater Company* lease or to approve of the same in writing, which is not at all decisive upon the legal aspect of this case, but very persuasive, and almost conclusively decisive, of the fact in this case that the *Theater Company* and its officers concluded to take their chances of the mortgagor avoiding a default and thus securing to themselves the benefits of the full term of the *Theater Company* lease.

We are therefore of the opinion that the doctrine of the *Sammons Case,* and as cited by Jones on Mortgages and in Ruling Case Law, has no application to the case at bar.

In view of what has been said, it is unnecessary to take up and treat further the claim made by the attorneys for the *Theater Company* under which it is contended that the plaintiff is estopped from insisting upon the priority of the trust deed or mortgage over the lease. The real party in interest is not the trustee but the bondholders. The latter had no knowledge of the *Theater Company* lease or of the changes made to accommodate the *Theater Company,* and, the trustee not having authority in the premises, the bondholders cannot be held as bound and cannot be deemed estopped.

By all the authorities we have been able to find, pertinent to the subject, it is held that, in order to authorize the trustee to subject the trust deed to a lease subsequently made, the right must be contained in the provisions of the trust deed either by express language or by necessary implication, and,

such language not being contained in the trust deed in question, the result follows that the trust deed in question is not subject to the lease. Other authorities confirming this position are *Sands v. Kaukauna W. P. Co.* 115 Wis. 229, 91 N. W. 679; *Haven v. Adams,* 4 Allen (86 Mass.) 80; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1.

It is further contended by the *Theater Company* that the mortgagor assigning the rents to the mortgagee, and both the mortgagor and mortgagee notifying the tenant of such assignment, and the tenant paying the total rents accruing under the lease to the mortgagee, as disclosed by the uncontradicted evidence, was an attornment and established the relation of landlord and tenant between the mortgagee and the tenant.

The law of attornment does not apply as between the tenant of a mortgagor and the mortgagee in states where the legal title of the mortgaged premises does not pass to the mortgagee. The status of the mortgagor and mortgagee with respect to mortgages and trust deeds has heretofore been fully set forth, under authorities cited.

The doctrine is stated in 2 Jones, Mortgages (7th ed.) § 778:

Attornment ineffective where mortgage is mere lien. "But in a state where a mortgage is regarded as conveying no title to the mortgagee, and the right of possession until foreclosure and sale is assured to the mortgagor by statute, it has been held there is nothing to rest an attornment upon and that the doctrine has no application. The verbal agreement of a tenant to pay rent to the mortgagee does not continue the existing tenancy, simply putting the mortgagee in place of the mortgagor as landlord; but it is a new undertaking and must be valid as a new agreement if valid at all. In such states a mortgage by the lessor does not carry the reversion in the leased premises so as to entitle the mortgagee to recover rents; though the mortgagee may, of course, secure the right to the rents by an assignment contained in the mortgage. In such states, the tenant cannot repudiate his tenancy under the mortgagor and acknowledge a tenancy

under the mortgagee, until after the mortgage has been foreclosed and the period of redemption has expired."

In a Michigan case (*Hogsett v. Ellis,* 17 Mich. 351) it is said:

"If it be said that, though the mortgage does not give the mortgagee the right to possession against the will of the mortgagor, yet, by the consent of the mortgagor and the tenant, he may be let into possession, and thus acquire the right to rent; so, I reply, may any other person not holding a mortgage acquire, in the same way, the right to possession, and the right to rent, by any valid agreement to that effect. But, in both cases alike, I think it would depend upon the contract *as such,* which might be made between them, and not upon the doctrine of attornment."

In connection with this doctrine of attornment we must reiterate what has been repeatedly heretofore said, that neither under the express terms of the trust deed or mortgage, nor by necessary implication, did the trustee have the right or authority to do anything before conditions broken that would jeopardize the interests of the bondholders with respect to the lien acquired at the time of the execution of the trust deed.

As to the status of the *Theater Company* and the mortgagee after conditions broken, and after entry on the part of the mortgagee, a different situation exists.

It is said in *Gartside v. Outley,* 58 Ill. 210, 214, 215:

"It is in the power of the mortgagee, on entry for conditions broken, where the property has been leased subsequent to the making of a mortgage, to treat the tenant as a trespasser and bring ejectment, even without notice, or the mortgagee may elect to recognize the lessee as his tenant. The authorities all agree in holding, where the mortgagee has entered for conditions broken, or received rents of the tenant, that the relation of landlord and tenant will be created between the parties. . . . The question of the time for which it will be considered that the tenancy is created by the fact that the mortgagee received rents of the lessee, whether for the entire period of the unexpired lease, or for only a shorter period, is a question of more difficulty of

solution. The generally received doctrine seems to be that the receipt of rents by the mortgagee will only create a tenancy from year to year, in analogy to the rule where the tenant holds over after the expiration of the lease. The doctrine proceeds upon the ground that the lease is inoperative as to the mortgagee, and is terminated by the act of entry. The rule of the common law is well established, that the mortgagor cannot, without the consent of the mortgagee, execute a lease that will prevail against the rights of the mortgagee, and it has been uniformly held that the entry of a mortgagee puts an end to the lease. *Keech v. Hall,* 1 Doug. 2. Upon principle, therefore, something more is required than the mere receipt of rents from the lessee, to make valid the lease for the unexpired term as against the mortgagee. In *Doe ex dem. Hughes v. Buckner,* 8 Carr. & Payne, 566, PATTERSON, J., held that if the mortgagee instead of turning out the lessee elects to take him as his tenant, the mortgagee does not thereby set up the tenancy for the entire unexpired term of the lease, but only from year to year. The case of *Thunder v. Belcher,* 3 East, 449, holds the same doctrine, that the receipt of rents will only create a tenancy from year to year, as between the lessee and the mortgagee. We find that these cases have been quoted by numerous text-writers and the doctrine established does not seem to be questioned. Hilliard, Mortgages, p. 235, § 231; Taylor, Landl. & T. § 120; Platt, Leases, p. 171."

While the doctrine as set forth in the *Gartside Case, supra,* undoubtedly is the accepted doctrine of the authorities on the subject, under that very doctrine it would appear to us that when in the year 1916 the trustee, after conditions broken, took possession of the mortgaged property and collected the rents, issues, and profits thereof, including the rents from the *Theater Company,* and immediately followed such acts by a foreclosure proceeding in the instant case, that he thereby made manifest his intention of not treating the *Theater Company* as a trespasser, but of treating it as his new tenant under a lease to expire upon the sale of the property under foreclosure proceedings.

Having covered all of the various points made in the brief

of counsel for the *Theater Company* and having arrived at a conclusion adverse to the contentions of such company, we will now take up the consideration and determination of question No. 2, above set forth.

It is contended by the trustee for the second-mortgage bondholders and by the individual bondholders, defendants herein, and by the *Real Estate Company* and its receiver, that, among other things, the trustee retained over $22,500 out of the proceeds derived from the sale of the bonds secured by the first trust deed or mortgage for his own individual purpose and for other purposes foreign to the provisions of such trust deed or mortgage, under and pursuant to which such proceeds were to be used solely in the erection and construction of the building; that he also converted to his own use, or wrongfully disbursed and expended, a large sum of money derived as interest on the first-mortgage bonds and by way of rentals and income from the tenants in the Arcade Building (and that he otherwise violated his trust in other particulars, with respect to which it is not necessary at this time to go into detail) in the administration of his trust, all to the great damage of such defendants, on account of which such defendants have in the course of the trial demanded that said *Schroeder* be impleaded individually in order to enable such defendants to compel him to account for such maladministration personally, etc., and an offer of proof was made by such defendants in order to substantiate such allegations.

With respect to the issues raised by such defendants, among other things the court found, in addition to the findings already hereinbefore set forth, as follows:

That *Schroeder,* acting as trustee under both the first and second mortgages, purchased the mortgaged premises at tax sales for the years 1915 and 1916 for the city and county taxes, and out of the rents collected, after taking possession as trustee, repaid himself for redemption moneys.

That plaintiff entered into the possession of the mortgaged premises as trustee, with the mortgagor's consent, on October 11, 1916 (which was the day of the commencement of this action).

That *Schroeder,* as trustee, had advanced for the benefit of said mortgage bondholders various interest payments aggregating $23,000, and is entitled to be subrogated in that sum.

That $4,000 is a reasonable solicitors' fee to be paid to the plaintiff's attorneys.

The court also in such findings allowed the plaintiff, as trustee, for the collection of the rents an amount equal to three per cent. as stipulated in the mortgage, and also allowed him an additional fee as trustee in renting, making repairs, managing, and otherwise caring for the mortgaged premises and property and for performing other duties devolving upon him as trustee, and found such sums as reasonable.

As conclusions of law the court found that the counterclaims of the defendants *Real Estate Company* and *Benjamin Leafgreen,* the counterclaim of the defendant *Esbenshade* as executrix, the counterclaim of the defendant *Hummel,* and the counterclaim of the defendant *Leidig* as trustee, should be dismissed; and judgment pursuant to such findings was thereupon duly entered and docketed.

Schroeder, as trustee, was the plaintiff in the action. As an individual he was not a party, and in law could not be considered a party unless he was impleaded in his individual capacity. The mere fact that he was a party in a representative capacity does not authorize proceedings against him in an individual capacity unless he is first joined as an individual. In other words, in contemplation of the law *Schroeder* as an individual and *Schroeder* in a representative capacity are deemed two distinct entities.

"A bill cannot unite distinct demands against the same defendant, where his liability upon one is individual and upon the other is in a representative capacity; but the rule

is confined to the presentation of distinct demands and does not extend to cases where defendant is otherwise a proper party in both capacities." 16 Cyc. 255.

So that we must conclude that *Schroeder* as an individual was not before the court.

Of course the rule is well recognized that a failure to use reasonable diligence or an abuse of his discretionary powers renders a trustee under a trust deed personally liable to the party injured for the damages done. Jones, Mortgages, § 1771.

As already stated, the application to implead *Schroeder* individually was not made to the lower court until after the trial of the issues had proceeded for a period of about two weeks. It must not be understood that it is our opinion that *Schroeder* as an individual would not have been a proper party; on the contrary, it is our opinion that had the court seen fit, even at that stage of the trial, to suspend the trial for the purpose of impleading *Schroeder* and of thus enabling an accounting and a final adjudication of the issues presented by the defendants, it would have exercised a proper and a wise discretion, in view of the provisions of secs. 2610 and 2656*a*, Stats., which are intended to give the trial court very broad powers, not only in the calling in of parties but in the molding and adapting of the pleadings so as to finally dispose of all branches of the controversy. *Swanby v. Northern State Bank,* 150 Wis. 572, 577, 137 N. W. 763; *Doherty v. Doherty,* 131 Wis. 375, 111 N. W. 478; *Carney v. Gleissner,* 62 Wis. 493, 22 N. W. 735.

Sec. 2610, Stats., among other things provides that

"A defendant who shows by affidavit that if he be held liable in the action, he will have a right of action against a third person not a party to the action for the amount of the recovery against him, may, upon due notice to such person and to the opposing party, apply to the court for an order making such third person a party defendant, in order that the rights of all parties may be finally settled in one action, and the court may in its discretion make such order."

Sec. 2656*a*, among other things, provides:

"A defendant . . . may have affirmative relief against a codefendant, or a codefendant and the plaintiff, or part of the plaintiffs, or a codefendant and a person not a party, or against such person alone, upon his being brought in; but in all such cases such relief must involve or in some manner affect the contract, transaction or property which is the subject matter of the action."

Attention is called to the fact that in and by that portion of sec. 2610 quoted the interpleader is made discretionary with the court.

The portions of the sections above referred to have been repeatedly construed by this court and the right to interplead has been held discretionary. *Ertel v. Milwaukee E. R. & L. Co.* 164 Wis. 380, 384, 385, 160 N. W. 263; *Kresge v. Maryland C. Co.* 154 Wis. 627, 631, 143 N. W. 668; *Schmuhl v. Milwaukee E. R. & L. Co.* 156 Wis. 585, 586, 146 N. W. 787; *Hemenway v. Beecher,* 139 Wis. 399, 402, 121 N. W. 150; *Swanby v. Northern State Bank,* 150 Wis. 572, 137 N. W. 763.

Furthermore, it has been repeatedly decided by this court that an order denying a motion to bring in a person who may be a proper but is not a necessary party is not appealable. *Reinhart v. Fire Asso.* 93 Wis. 452, 67 N. W. 701; *Cook v. Menasha,* 95 Wis. 215, 70 N. W. 289; *Wechselberg v. Michleson,* 105 Wis. 452, 81 N. W. 657; *State v. Wis. T. Co.* 134 Wis. 335, 341, 113 N. W. 944; *Schmuhl v. Milwaukee E. R. & L. Co.* 156 Wis. 585, 146 N. W. 787.

So that, with respect to said question No. 2, we answer, first, that, inasmuch as it was discretionary with the court to have either impleaded or denied the impleading of *Edward Schroeder* individually, in refusing to permit *Schroeder* to be impleaded the court acted within its rights and exercised its discretion; and secondly, that, the court having exercised its discretionary rights, an appeal from the ruling of the court does not lie.

It is contended by counsel for the *Real Estate Company* and for *Leafgreen* that the foreclosure action was prematurely brought for four reasons, namely:

a. Because no meeting of the bondholders declaring a default and directing the trustee to enter and foreclose the mortgage was ever held.

b. Because no six months' notice in writing of the alleged default under the ninety-nine-year lease was given.

c. Because no six months' notice was given of the intention to declare the whole amount due for nonpayment of interest or any other alleged violation of the terms in either one of the trust deeds.

d. Because there was in fact no interest due and unpaid at the time the foreclosure was begun.

We will first take up the contention under paragraphs a, b, and c.

Article 6 of the trust deed provides:

"In case such default shall be made in the payment of any interest on any of the bonds issued hereunder and shall continue for the period of six months after payment of such interest shall have been duly demanded in writing, or in case default shall be made in the payment of the principal of any of such bonds when the same shall become due or be declared due and payable as in this mortgage provided, or in case default shall be made in the performance of any other agreement or stipulation herein or in said lease contained on the part of the mortgagor and lessee, or either of them to be kept and performed, then and in either or any or every such case it shall be lawful for the trustee, and upon a requisition in writing signed by the holders of not less than one third in amount of the bonds then outstanding, and adequate indemnity against all costs, expenses and liabilities to be by him incurred, it shall be the duty of the trustee to proceed to enforce the rights and liens of the bondholders under this mortgage, either by the foreclosure," etc.

It will thus be seen from the portion of article 6 above quoted that for a default in the payment of interest upon the bonds it is necessary that the same shall continue for

a period of six months after a payment shall have been duly demanded in writing before the trustee can commence any action to foreclose the mortgage on that account. However, it is clear from the subsequent provisions of said article 6 that where default shall be made in the payment of principal, or in case default shall be made in the performance of any other agreement or stipulation, which would include a default pursuant to failure to pay taxes on the property, the trustee is authorized to proceed with the foreclosure of the mortgage; and the subsequent provision of said article 6, above referred to, makes this clear, because it provides in express terms that "upon a requisition in writing, signed by the bondholders, . . . and upon adequate indemnity having been given," etc., it shall be the duty of the trustee to proceed with foreclosure or some other remedy provided for in the trust deed.

It is clear, therefore, that said article 6 first on the given default extends and grants the right to the trustee to foreclose of his own motion, if he so desires, and becomes compulsory upon the requisition of the bondholders and the furnishing of security as is so provided in said trust deed.

Article 4 of the trust deed provides:

" . . . or in case the mortgagor . . . shall fail to observe, keep, or perform any condition of said lease, then and thereupon the principal of all bonds secured by this mortgage shall at the election of the trustee immediately become due and payable. Provided that a majority in interest of the holders of all such bonds issued hereunder and then outstanding may in writing or by a vote of such majority at a meeting duly held as herein provided, at any time after such default or failure, declare, or instruct the trustee in such case to declare, that upon the expiration of said period after such default and demand, or immediately after such failure to insure, the said principal shall become immediately due and payable as aforesaid, and the same shall thereupon become immediately due and payable; or such majority may, in like manner, waive or instruct the trustee to refrain from making such election and declaration on such terms and

conditions as such majority may deem proper, and may annul or reverse the previous election made or action taken by the trustee in that behalf, whereupon said principal sum shall immediately cease to be due and payable."

Under and pursuant to said article 4 of the trust deed, therefore, the trustee had authority, upon failure of the mortgagor to observe or keep or perform the conditions of said lease, among which was the obligation to pay taxes, to elect to and to declare the whole amount of the principal of said bonds due. However, the bondholders at all times retained the right to waive such default and to insist that the trustee refrain from making such election and declaration of default.

The notice of election of the trustee to declare the whole amount of the first-mortgage bonds due assigned as reasons the failure to keep the covenants and conditions of the ninety-nine-year lease requiring the payment of taxes, and the default on the part of the mortgagor in the payment of the taxes for the years 1914 and 1915. So that it is apparent that said trust deed gave the right to the trustee to declare the first-mortgage bond indebtedness due for breaches of the terms of the ninety-nine-year lease without a meeting of the bondholders as a condition precedent.

It is true that there is a provision in the ninety-nine-year lease that any successor in interest of the lessee must be given notice by the lessor, in writing, of the fact that he has not performed the covenants of the lease and that such successor in interest has six months after such notice in writing in which to perform. No such notice was ever given, and the notice given by the trustee on October 2, 1916, being the notice of default for payment of taxes, etc., is the only notice that was given with respect to any failure on the part of the mortgagor. This notice last referred to is a notice expressly designed to be for the benefit of the lessee under the ninety-nine-year lease, being the mortgagor under the trust deed, and is contemplated to be given and can be given

only by the lessor. Such provision in the ninety-nine-year lease inures to the benefit of the lessee, or mortgagor under the trust deed, and prevents any action on the part of the lessor in the form of proceedings to forfeit the ninety-nine-year lease on account of such conditions broken on the part of the lessee during the six months' period.

Inasmuch, however, as a failure to pay the taxes under the ninety-nine-year lease was expressly made a default, upon the happening of which, under the provisions of the trust deed, the trustee was authorized to proceed by election to declare the whole amount of the principal of the bonds due by foreclosure, the trustee was fully authorized to proceed with his declaration and foreclosure, notwithstanding the aforesaid provision in the ninety-nine-year lease.

It is also claimed that there was in fact no interest due and unpaid at the time the foreclosure was begun, and it is claimed that every interest coupon that had matured before foreclosure had been discharged and paid by *Schroeder*. The evidence, however, shows that *Schroeder* had advanced the interest to the bondholders and held the coupons as security for the advancements, and that he is entitled to be subrogated to the rights of the coupon holders, and the court so found.

The evidence also shows that *Schroeder* held these coupons and that they were not marked "canceled," and *Schroeder's* books as trustee do not show the payment of the interest on the coupons. The evidence also shows that *Schroeder* kept two accounts with the *Berlin Arcade Company,* one an account of moneys advanced on its account by him personally, and another account which shows his receipts and expenditures as trustee, entered on the books as "*Edward Schroeder,* special," and that from time to time, when there were moneys received as income from the mortgaged premises, it would be transferred from the *Edward Schroeder,* special, account in part payment of the indebtedness shown in the personal account of *Schroeder.*

It also appears that *Schroeder* had in this way advanced for the benefit of the *Real Estate Company* an amount to be paid to the bondholders for interest on the bonds in the sum of $23,000, as the result whereof foreclosure on the trust deed was delayed for a period of two years.

It would be inequitable and unjust under the circumstances, therefore, not to subrogate *Schroeder* for the payments so made to the interests of the bondholders under these coupons, and we hold that the circuit court in so doing should be sustained.

It is further contended by counsel for *Leafgreen* and the *Real Estate Company* that the current income up to the time of the foreclosure was in a sum greater than the amount necessary to discharge all previously maturing interest payments. *Schroeder's* books, having been introduced in evidence, clearly controvert this claim and show that the mortgagor, the *Real Estate Company,* was always indebted to the plaintiff, and that the advancements of *Schroeder* for the benefit of the mortgagee up to the time of the trial amounted to the sum of $24,875.

On April 15, 1914, the defendant *Leafgreen,* then owning substantially all the capital stock of the mortgagor, and the plaintiff, *Schroeder,* made an agreement in writing which among other things recited and provided the following:

First, the execution of the first trust mortgage and the fact that $125,000 of the first-mortgage bonds were all outstanding; second, the indebtedness of the mortgagor to *Schroeder* for insurance premiums, for $1,243.04; third, the holding by *Schroeder* of past-due interest coupons from first-mortgage bonds, aggregating $5,400.94, plus interest; fourth, the default by the mortgagor in the payment of the 1912 and 1913 taxes; and fifth, the accruing of additional interest on the mortgage and quarterly rent payable by the mortgagor under the ninety-nine-year lease on May 1, 1914.

It was therefore agreed that, in order to raise the above moneys then due and in the future accruing and to secure

Schroeder moneys owing him, the mortgagor pay to *Schroeder* $4,500 in cash, to be applied:

(a) In payment of semi-annual interest on first-mortgage bond coupons maturing May 1, 1914.

(b) In payment on account of taxes and assessments for the year 1912.

(c) In payment of quarterly rent owing Maria Niemann (the lessor under the ninety-nine-year lease), on May 1, 1914.

"If above sum is insufficient, *Schroeder* to advance sufficient money to make up deficiency."

Then the agreement provides for an assignment to *Schroeder* of all rent moneys accruing from mortgaged premises, etc. The moneys collected by *Schroeder* were to be applied by him as follows:

1. Wages for janitor and elevator man and charwoman, not exceeding $115 monthly.

2. Semi-annual interest and quarterly rent becoming due May 1, 1914.

3. Taxes and assessments, general and special, due or to become due.

4. All subsequent instalments of interest on first mortgages.

5. Rent under ninety-nine-year lease and taxes and assessments.

"When items 1 to 4 are paid, any surplus to be applied to the payment of sum due *Schroeder,* as recited in the first whereas preamble above for expenditures for taxes and amounts due on past-due clipped coupons."

When the foregoing sums are paid the agreement was to terminate. *Schroeder* was not bound by any fixed order of payments, but could apply moneys as by him deemed advisable, excepting only that nothing should be paid on account of moneys due *Schroeder* personally until interest, rent, taxes, assessments, and wages had been paid.

The mortgagor also agreed to defray all costs and expenses to operate the building, except for moneys to be paid out of rentals as above recited, and that it would make up any deficiency on account of any or all the above obligations if the rentals and income were insufficient.

The foregoing agreement is set forth in the answer of the *Real Estate Company* and of the defendant *Leafgreen*. This agreement amounts to a clear confession on the part of the *Real Estate Company* and *Leafgreen,* its principal stockholder, that at the date of said agreement, namely, April 15, 1914, there was a large indebtedness of the mortgagor to *Schroeder;* that there was no property in the hands of said plaintiff out of which such indebtedness at that time could be paid; and absolutely precludes the idea that there were unexpended portions of the proceeds of the first-mortgage bonds available at that time out of and from which these various obligations could be paid.

It also appears that the $22,500 alleged to be the unexpended portions of the proceeds of the first-mortgage bonds had been paid out in liquidation of obligations created by the mortgagor before *Leafgreen* became a stockholder and officer of the *Real Estate Company,* and that the mortgagor and *Leafgreen* knew of these facts at the time of the execution of said agreement of date of April 15, 1914.

Schroeder testified that from April 15, 1914, to October 11, 1916, *Leafgreen* had an office in the Berlin Arcade Building and that *Schroeder* consulted him with respect to all of the expenditures, and that *Leafgreen* never made any objections with reference to the same. And it further appears, as the result of cross-examination of *Schroeder* on the trial by one of the defendants' counsel, that he testified that the whole proceeds of the sale of the first-mortgage bonds were paid out upon the written directions of the mortgagor. If that be true, and there is testimony to substantiate it, notwithstanding the provisions in the first trust deed or

mortgage, wherein and whereby the proceeds of the first-mortgage bonds were to be all expended in the erection and construction of the building, such provision was modified by the mortgagor and *Schroeder,* and they, being the only parties interested, had a perfect right to make such modification.

It also appears from the testimony in the case that after the execution of the trust deeds in question the mortgagor and *Leafgreen* made a contract for the construction of the building whereby *Leafgreen* obligated himself to furnish all the material and do all the work to finish and complete it for $151,000, of which *Leafgreen* received $102,000, proceeds of the first-mortgage bonds, $30,000 in second-mortgage bonds at face value, and $19,000 in notes of the *Real Estate Company.* Additional expenditures were made, making the total cost of the building the sum of $193,000; and *Leafgreen* testified that $172,657 went into the building and that he still had coming to him for extras the sum of $21,157.

From the foregoing it would also appear quite conclusively that the contract last above referred to not only made it possible to complete the building without applying all the proceeds of the first-mortgage bonds for that purpose, but this agreement is also strongly indicative of an understanding by and between the mortgagor and the plaintiff, and tends to prove, that the balance of the first-mortgage bonds not expended in the erection of the building was disposed of for the purpose of paying the various items which the testimony shows were paid and which constituted the sum of about $22,500.

Let us now consider what the status of the trustee under the second trust deed and second-mortgage bondholders is in this case.

With respect to the alleged illegal expenditures and appropriations of the proceeds of the first-mortgage bonds and of other alleged misappropriations, the first-mortgage bondholders are directly interested.

"In the foreclosure proceedings, the trustee represents the first-mortgage bondholders, and it has been held that such trustee may sue to foreclose the mortgage without joining the bondholders. And where a bill in equity is filed by the trustees for the foreclosure of a mortgage, the individual bondholders are not necessary, nor, as a rule, even proper parties to the suit." 2 Elliott, Railroads, § 508; *Central T. Co. v. Burton,* 74 Wis. 329, 336, 43 N. W. 141; sec. 2607, Stats.

Article 6 of the trust deed also provides: "No holder of any bond or coupon hereby secured shall have the right to institute suit, action, or proceeding, in equity or at law, for the foreclosure of this mortgage, or for the execution of any trusts thereof, or for the appointment of a receiver, or for any other remedy hereunder;" and further provides that such right shall vest exclusively in the trustee.

The first-mortgage bondholders, not having participated in a modification of the trust agreement with respect to the application of the proceeds of the first-mortgage bonds, would undoubtedly have had the right, upon a proper pleading in that regard, to have enforced an accounting on the part of the trustee for the alleged improper expenditure of the amount of the first-mortgage bonds. Evidently, however, the first-mortgage bondholders considered the security ample to protect them, and therefore no application was made by them or by any of them intended to effectuate such purpose. On the contrary, they have seen fit to rely solely upon the security of the first trust mortgage and the property covered thereby, and this was and is their undoubted privilege.

The second-mortgage bondholders were contented to and did accept a second mortgage upon the leasehold interest of the mortgagor and the buildings thereon, subject in all respects to the lien of the first mortgage. The obligation provided for in the first trust deed or mortgage, wherein and whereby it is agreed that the proceeds of the first-mortgage bonds shall be used exclusively for the erection and con-

struction of the contemplated building, constitutes an agreement between the mortgagor and the first-mortgage bondholders, and is a personal agreement with the first-mortgage bondholders which in no manner inures to the benefit of the second-mortgage bondholders, and does not constitute an agreement running with the land so as to enable the second-mortgage bondholders to take advantage of the same. This agreement between the mortgagor and the first-mortgage bondholders was not one made for the benefit of a third party, namely, the second-mortgage bondholders, and in order to entitle the second-mortgage bondholders to the benefit of such agreement there must be on the part of the original parties to the contract a clear intent to effectuate that purpose. 2 Elliott, Contracts, § 1413.

Such intent not being made manifest from the wording of the first trust deed, such provision in the first trust deed becomes a personal covenant, if anything, and does not inure to the benefit of the second-mortgage bondholders. *Hartung v. Witte,* 59 Wis. 285, 18 N. W. 175; 7 Ruling Case Law, p. 1112, § 29. Therefore it becomes evident that the second-mortgage bondholders must rely, first, upon the equity in the leasehold estate after the satisfaction of the claims of the first-mortgage bondholders; and secondly, they have the right, in the event of an amount being realized upon such sale which is inadequate and insufficient to pay the amounts due them in whole or in part, to obtain a deficiency judgment against the mortgagor, which amount they must collect either from the receiver of the mortgagor in the receivership proceedings, as a general creditor, or, in the event that such receivership proceedings be discontinued or not made effectual, to sequestrate, upon proper proceedings, all the property of the said mortgagor not sold or disposed of under the foreclosure proceedings.

It follows, therefore, from what has heretofore been said that the trustee under the second trust deed or mortgage and the second-mortgage bondholders, except as herein stated,

have no interest whatsoever in this foreclosure proceeding, and that their counterclaims for affirmative relief were properly denied and dismissed.

The *Real Estate Company* also has appeared in this action, filed an answer and cross-complaint, and in law is authorized to participate in the litigation. Any proceeds, however, derived from this litigation, over and above what is necessary to satisfy the claims of lienholders, belong to and are the property of the receiver. The direction of the litigation in behalf of the mortgagor, and the control thereof, therefore, rests in the receiver, and the policy and remedies pursued by him must necessarily govern.

The receiver interposed an answer in and by which he puts the plaintiff to his proofs, alleges that all the holders of the outstanding bonds are necessary parties to this action, and asks that the equities of the several parties to the mortgaged premises be ascertained so that the receiver may determine the amount necessary to redeem from the liens as so established. He further asks that only one judgment of foreclosure be entered, and expressly reserves the right to litigate in a separate action the issues in an action then pending in the circuit court for Milwaukee county, brought by the receiver against *Edward Schroeder* and others and designed to recover damages on account of misconduct on the part of the trustee and misappropriation of funds.

It having been found by the court below that the amount of the principal of the bonds on both the first and second mortgages is due, together with the interest and other items, such as taxes, etc., and there being ample evidence to sustain such finding of the lower court, and one judgment having been entered as prayed for by the plaintiff and the defendant *Leidig* and the receiver, the judgment of the lower court must be affirmed.

Counsel for *Leidig,* trustee, etc., also contends that he has the right to compel the plaintiff in this action, by the judgment of the court, to marshal and apply all of the assets

available to the trustee for the first-mortgage bondholders, and to compel the trustee to first satisfy as much of the claim of the first-mortgage bondholders out of such assets, other than the leasehold interest and the buildings thereon, as such assets will pay, before resorting to the mortgaged property; and he also claims the right of subrogation of the trustee for second-mortgage bondholders to the rights of the trustee for the first-mortgage bondholders with respect to such assets, exclusive of the mortgaged property.

The doctrine of marshaling of assets is an old equitable doctrine, well recognized in this and other states, and should be applied wherever available and where the same does not work hardship or inequity to the interests of the first-mortgage bondholders. As is said in 6 Pomeroy, Eq. Jur. (3d ed.) § 865:

"The equitable remedy of marshaling securities, with that of marshaling assets, depends upon the principle that a person having two funds to satisfy his demands shall not, by his election, disappoint a party having but one fund."

It appears from the testimony in this case that the plaintiff has but one property out of which to satisfy the claim of the mortgage bondholders, and that is the mortgaged property. The balance of the assets coming into the hands of the trustee have all been expended, either rightfully or wrongfully, so that in reality there is not more than one fund or one property out of which the plaintiff can satisfy his claim. What the mortgagor retains is a mere claim of cause of action.

Under these circumstances the doctrine of the marshaling of assets is not applicable, for the reason that the claim arising for misappropriation of the proceeds of the first-mortgage bonds and for misconduct of the trustee is one which may involve the trustee in litigation. A paramount creditor, such as the trustee in this case, cannot be compelled to exhaust in the first instance a mere personal remedy. 26

Cyc. 930, 931; *Palmer v. Snell,* 111 Ill. 161; *Wolf v. Smith,* 36 Iowa, 454; *Boone v. Clark,* 129 Ill. 466, 21 N. E. 850; *Walker v. Covar,* 2 S. C. 16.

Objection is also made by counsel for the second-mortgage bondholders and the receiver that the court erred in allowing *Schroeder* to reimburse himself for moneys advanced by him in the construction of a bowling alley. There is ample evidence in the case to prove that these expenditures were made upon the direction and under the supervision of *Leafgreen,* who was at that time the president of the *Real Estate Company* and the owner of practically all the stock of such company, and that it was understood and agreed between the mortgagor and *Schroeder* that *Schroeder* should be reimbursed for all moneys expended by him personally on that account.

A solicitor's fee of $4,000 was allowed to plaintiff's attorneys by the court. There is ample evidence to sustain the finding of the lower court that such allowance was reasonable. We appreciate the efforts and labor connected with this foreclosure and the trial of the action and the knowledge and experience requisite for that purpose.

The allowance made for the receiver is also reasonable, and the evidence fully warrants it.

There is no charge made in this case that there was collusion between *Schroeder,* the trustee, and the first-mortgage bondholders, and the purchase in good faith of the first-mortgage bonds by their holders, and the payment at par therefor, is unchallenged.

By the Court.—The judgment of the lower court is affirmed.

The following opinion was filed October 3, 1921:

Eschweiler, J. (*dissenting*). In this case I think the lower court should, during the trial, have granted the motion made to require the plaintiff trustee to disclose the names

of the bondholders whom the plaintiff as trustee merely was representing. I think also that this court should have granted such relief upon the motion made after hearing of this case.

The purpose of all the transactions with reference to this real estate was to secure a building upon the same which should be rented and become revenue producing. In order that it might be such it was essential that some one in lawful possession of the premises at the time should be able to enter into definite and certain leases with tenants and for reasonable terms. The consent of the trustee, not having taken possession, was entirely unnecessary, and the question whether or not he had so consented would only be material, if at all, upon the question of whether he was not thereby estopped from thereafter questioning any such lease. It stands uncontradicted in the record that the arrangement made with the *Arcade Theater Company* was a reasonable lease.

I think it became a binding obligation on all concerned and should not be regarded as in the nature of an incumbrance on the property, and that neither the mortgagor nor the trustee plaintiff should be heard to question the obligations of this lease, and it was as binding against the property as it was against the tenant.

A motion for a rehearing was denied, with $25 costs, on October 18, 1921.

BLOOMER, Respondent, vs. KOEPKE and another, Appellants.

September 20—October 18, 1921.

Appeal: Order granting new trial: Discretion of court: Verdict contrary to evidence.

1. The action of the trial court in setting aside a verdict for plaintiff and granting a new trial because the verdict was contrary to very persuasive evidence that plaintiff's contract with the defendants was for an entire road-building season for a stated sum, is an exercise of discretion which will not be disturbed on appeal.
2. Where, in addition to such evidence, defendants admitted, both orally and in writing, that plaintiff was hired for the season, they could not complain that the court granted a new trial and allowed them to go before another jury on the issue.

APPEAL from an order of the municipal court of Outagamie county: ALBERT M. SPENCER, Judge. *Affirmed.*

Action to recover compensation for work done under a contract of hiring. Plaintiff claimed he was hired for the concrete paving season of 1920 as foreman in charge of a certain highway paving job for the sum of $4,000; that he performed his part of the contract; that he was paid the sum of $647.50 and no more, and that $3,352.50 was still due him. Defendants claimed he was hired to complete the entire paving job for $4,000; that he failed to perform the entire job; that allowing him at the contract rate for the portion completed he earned only $1,715, of which $647.50 had been paid him, leaving only $1,067.50 due, for which amount they tendered judgment.

The jury found that (1) the defendants did not agree to pay the plaintiff the sum of $4,000 for his services for the season of 1920 for superintending the construction of the highway; (2) the plaintiff continued in the service of the defendants during the road-building season of 1920; (3) the defendants agreed to pay the plaintiff $4,000 for his services for superintending the construction of the full and complete

road job of 4.83 miles in length; and (4) they assessed plaintiff's damages at $3,000 if the court was of the opinion plaintiff was entitled to recover.

The court was of the opinion that the verdict was contradictory, unsupported by the evidence, and perverse, and granted a new trial. The defendants appealed.

C. G. Cannon of Appleton, for the appellants.

Mark Catlin of Appleton, for the respondent.

VINJE, J. The trial court faced a situation by no means uncommon in jury cases. He felt that, in view of the very persuasive evidence to the effect that the hiring was by the season at $4,000, justice had not been done, and yet he felt, in view of defendants' contradiction of such evidence, he ought not to change the first finding of the jury and render judgment for plaintiff, but that he would set aside the verdict and grant a new trial. He could not allow a *pro rata* compensation for the completed work as asked by the defendants because there was evidence that the work was delayed by reason of the defendants' failure to furnish material and there was no evidence of the reasonable value of the services rendered. So he granted a new trial. His discretion in that respect cannot be disturbed.

In view of the evidence of several witnesses besides plaintiff's to the effect that the hiring was by the season for $4,000, and the admission of the defendants to the same effect both orally and in a letter to the state highway commission, the defendants certainly cannot complain because the court granted them another opportunity to go before a jury on such issue.

By the Court.—Order affirmed.

WILL OF DERUSSEAU: CRAITE and others, Appellants, vs. MORNEAU, Respondent.

September 21—October 18, 1921.

Wills: Epileptics: Testamentary capacity: Presumptions: Undue influence: Fiduciary relation: Evidence: Agreement in consideration of making will: Breach as ground of will contest.

1. While the fact that a testator was epileptic may be important in determining the question of testamentary capacity, neither insanity nor testamentary incapacity can be presumed from the fact that he had long suffered from epilepsy, where there is no proof that he had hallucinations or delusions in the intervals between attacks, and where the will was of such a character as to be easily understood.
2. Evidence that testator lived in the home of the sole devisee for about a month just prior to the execution of his will, the devisee being sometimes present with others when the testator transacted financial affairs, did not show a fiduciary relationship so as to change the ordinary rule as to the burden of proof.
3. So, also, evidence that testator lived in the home of the devisee for about five years under an agreement to devise his property to him in return for support and medical attention during his life, and that the devisee went with him to have the will drawn, but was not present when instructions for drawing it were given, would not be sufficient proof of undue influence, even if the devisee had first suggested that some arrangement be made to compensate him for the burden he was to assume.
4. The fact that the devisee, after caring for testator in his home for about five years, took him to an insane asylum when it became impracticable for him to remain in devisee's household, even if it be a breach of contract, is not a ground for contesting the will.

APPEAL from a judgment of the circuit court for Barron county: W. R. FOLEY, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court affirming a judgment of the county court admitting to probate an instrument purporting to be the last will and testament of John Derusseau, deceased.

The will in question was executed on April 29, 1912, the

respondent being named sole beneficiary and the appellants, brothers and sisters of the deceased, being expressly excluded. At the same time a contract was entered into between the respondent and the deceased whereby the respondent, in consideration of $15 a month and his being named sole beneficiary, agreed to take the deceased into his home and provide food, clothing, and medical attention for him during his life and care for him as he would for one of his own infant sons.

The deceased lived at the home of the respondent from the early part of April, 1912, until his removal to the Eau Claire insane asylum, after an application by the respondent in January, 1917. In October, 1917, a brother-in-law secured his release and took him to Rice Lake. He returned him soon after to the asylum, but in December, 1917, he again secured his release and arranged for his care in a Catholic sisters home in Dubuque, Iowa, at which place he died in August, 1918, at the age of thirty-nine years.

The deceased had suffered from epileptic fits since early childhood. Because of this affliction relatives as well as strangers were reluctant to have him in their families. As a consequence, since the death of his mother in 1902 he had lived at various places for short terms, sometimes with relatives, sometimes on the farms of neighbors as a farm-hand, and a few seasons in the woods with logging crews. For approximately two years previous to the making of the will and contract he had been employed on the farm of one of his brothers-in-law, John Dorsey, at whose request he was taken to the home of the respondent.

The heirs at law objected to the probate of the instrument in question as the will of the deceased on the ground that it had been procured by undue influence and that at the time of its execution the deceased was of unsound mind, and not possessed of sufficient mental capacity to make a will.

There was testimony to the effect that E. Craite, a brother-in-law, acted on various occasions as business adviser of the

deceased, and this witness claims to have influenced him to make certain deals, as well as to have attended to the details. There was testimony to the effect that the respondent was nearly always present when any money was paid to the deceased. Several of the brothers and sisters stated that the deceased talked and acted queerly and foolishly; that he was very forgetful, and sometimes forgot when he had lent money; that he could not be trusted to do certain tasks because of this forgetfulness; that he could not carry on a connected conversation except at rare intervals; that no one seemed to like to talk to him or be in his company; that some of his relatives were afraid of him; and that at school he was not able to learn. Mr. Craite testified that the deceased had told him in 1917 and after he had returned from the asylum that he had never made a will; that although he had made arrangements with the respondent he wanted the others to have equal shares. Most of the testimony as to the eccentric conduct and conversation of deceased was given by relatives interested in breaking the will.

The respondent called several witnesses who testified that they had had business transactions with the deceased in which he acted like any one else and always seemed to be able to look after his interests. Numerous witnesses for proponent testified that they noticed nothing unusual in his talk or actions except when he had the seizures; that he did not talk or act foolishly except at such times; and that when well he was a good worker and could be trusted. Mr. Whittaker, a notary public who conducted an abstract office, testified to numerous business transactions with him as to drawing satisfactions, mortgage assignments, and deeds. Sometimes he would go to the office alone, sometimes with others. These transactions continued from 1901 to 1912. Mr. Whittaker's evidence was that testator was keen in business matters. Other disinterested witnesses gave similar testimony as to his business transactions.

Other facts will be stated in the opinion.

For the appellants the cause was submitted on the brief of *M. S. Hines* of Rice Lake.

Arthur E. Coe of Barron, for the respondent.

JONES, J. If it were not for the testimony that the deceased had suffered from epilepsy since childhood, the facts in this case would call for very little discussion.

The testimony given by relatives as to the peculiarities, forgetfulness, lack of reliability, and foolishness in conversation which they attributed to the deceased was far outweighed by evidence given by disinterested witnesses concerning his general intelligence and especially his ability to attend to his business affairs. Except for an item of evidence by one of his relatives that he had forgotten a small loan he had made, there is no testimony of any unwise business transactions. On the contrary, the evidence shows that by his industry and frugality, notwithstanding the untoward conditions of his life, he had increased his small inheritance from $2,000 to $3,500. In a small way he had become a capitalist and had invested and reinvested his money with at least average prudence. It is true that sometimes Mr. Craite, his brother-in-law, had advised with him in these transactions, but at other times he went to the conveyancer alone, and seemed to exercise ordinary business judgment, and was "keen enough to get seven per cent. when he could."

It is strongly urged by the appellants, however, that any preponderance of the testimony as to the general business capacity of the deceased is overcome by the fact that he had been an epileptic since infancy. There was testimony that he sometimes had these seizures once or twice a day, sometimes once or twice a month, that sometimes he would be unconscious for an hour, sometimes for a day. Dr. Wallis, witness for contestants, testified that the disease is a progressive one "in which the seizures become more intense and more frequent until death occurs, which usually does

eventually, and during this time the mind is in a progressive state of deterioration," and that the epileptic seizure is followed by mental derangement of some degree which may last from a few hours to a few days. The doctor further testified: "It's a mental disease, because it is a progressive mental disease in which the mentality of the patient deteriorates from the minute of the first seizure in direct proportion to the intensity and the frequency of the attacks, until the mind is lost or death ensues, or the patient is cured. Those are the three conditions."

Contestants' counsel rely largely upon this testimony and upon the fact that deceased was committed to the insane asylum as evidence tending to establish his testamentary incapacity when the will was made. This commitment was made four years and eight months after the execution of the will. There was a little testimony to the effect that his mental condition was not very different at the time of the commitment from the condition when the will was made. The evidence is clear, however, that the seizures had become more violent at the later period, and he died about seventeen months after the commitment.

The testimony convinces us that the mental and physical condition of the testator had greatly changed in the interval between the execution of the will and the commitment to the insane asylum. We have been surprised to find that the effect of epilepsy upon testamentary capacity has been so seldom passed upon by the courts of last resort. Only one such case is cited in the briefs of counsel, to wit, *Lewis's Will,* 51 Wis. 101, 7 N. W. 829. In that case the general testimony showing peculiarities and weakness of mind of the testator was more weighty than in the instant case. In that case the testator was about sixty years of age when the will was executed. He had been absent from Wisconsin for several years and returned to the state for the purpose of selling his land. The will bore date March 12th.

On the day before he had been seized with a fit and became unconscious. There was another seizure within about five minutes after the execution of the will, and on the 14th of March he died. In an opinion by Mr. Justice LYON the will was sustained, and it is stated, "It is doubtless within the knowledge of almost every person of ordinary intelligence that the victims of that malady frequently retain their mental faculties fully to the moment of attack, especially in the earlier stages of the malady."

In the present case there is no proof of any seizure for some weeks before or after the execution of the will. The testimony shows that the testator first went to his notary public and then to Mr. Coe, who prepared the will, and on both occasions, in their judgment, seemed in a normal frame of mind. Undoubtedly he had long been the victim of a deplorable mental disease and there had probably been some impairment of his mental powers before the execution of the will. From the answers filled in by the medical examiners when the testator was adjudged insane, it is argued by proponent's counsel that he was not then insane, but it is unnecessary to decide this question. Presumptions are not generally retrospective, and even if he was insane at the time of the commitment it does not follow that he was insane four years and eight months before. Neither insanity nor testamentary incapacity can be presumed from the fact that a testator has long suffered from epilepsy. It is true that such a condition may be an important fact in connection with other facts in the determination of the question, but it is a matter of common knowledge that many persons have long been the victims of this dread disease and yet possessed in the intervals between attacks a high degree of mental power. In Ray's Medical Jurisprudence of Insanity it is said, page 477:

"Zacchias contends that epileptics should not be responsible for any acts committed within three days of a fit, before or

after. The principle is undoubtedly sound as it regards criminal acts; and certainly civil acts performed within two or three days after a fit deserve to be closely scrutinized. Not infrequently, however, the intellect may be as clear and strong as usual up to the very moment of an attack, and therefore it would seem as if other and satisfactory reasons should be required for invalidating transactions executed under such circumstances."

It cannot be said that because a person is an epileptic he is therefore insane. *Will of Rapplee,* 66 Hun, 558, 21 N. Y. Supp. 801; *Johnson's Will,* 7 Misc. 220, 27 N. Y. Supp. 649; *Estate of Jansa,* 169 Wis. 220, 171 N. W. 947.

There is no testimony that the testator had hallucinations or delusions in the intervals between attacks. Neither the will nor the accompanying agreement was so complicated as not to be easily understood. We are convinced from the whole testimony, including that relating to epilepsy, that the testator had sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were or should or might have been the objects of his bounty, and the scope and bearing of the provisions of his will, and that he had sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. We therefore hold with the county judge and the circuit judge that the testator was competent to execute the will in question.

It is strongly urged by contestants that the will was obtained by undue influence. As the basis of their argument it is urged that the proponent of the will sustained a fiduciary relation toward the testator. There is no evidence that the proponent had been the trusted agent of the deceased prior to the execution of the will. On the contrary the evidence shows that Mr. Craite, husband of one of the contestants, had been much more active than the proponent

in assisting the testator in his business affairs. Apparently there had been no greater intimacy between John Derusseau and *Morneau* than had existed with other relatives. It is true the deceased had at times lived with *Mr.* and Mrs. *Morneau,* but he had also at times lived with other members of his family. Any inference of a fiduciary relationship must rest upon the bare facts of the relationship and residence in the same household with the proponent for about a month just prior to the execution of the will. We do not consider that the evidence shows any such fiduciary relation before or at the time of the execution of the will as to change the ordinary rule as to the burden of proof.

As furnishing one of the elements of undue influence it is argued that the other relatives were not informed of the execution of the will. As bearing on this subject it is an important fact that the testator had offered to make a similar arrangement by will to his sister *Mrs. Craite* if she would agree to support him, and that she had rejected the offer. His plan of disposing of his property thus became known to one of his sisters and perhaps it is fair to assume that it became known to the others. We do not believe that under the circumstances it became the duty of the respondent to discuss the subject with other members of the family.

It is urged that the deceased was one easily subject to undue influence by others. This subject is partly covered by the foregoing discussion as to his competency. There is a singular lack of testimony that he had been influenced against his will by *John Morneau* or any one else. The evidence that Mr. Craite had in one or two instances given advice which had been followed is the only evidence bearing on the subject.

It is urged that *John Morneau* showed a disposition to gain an undue advantage and that he had the opportunity for so doing. Unless the will and the agreement afford such evidence there is nothing to support this contention. There

is no evidence of any importunity on his part nor that he in any way took any advantage in his business dealings with the testator.

It is true that when the testator went to Mr. Whittaker and asked him to draw a will proponent went with him and heard the conversation. Mr. Whittaker had long known that the testator had epileptic seizures and for that reason advised him to go to a lawyer who would understand the subject better. When he went to Mr. Coe the proponent was not present during the interview in which the instructions were given. Mr. Coe had known the deceased for years and was aware of his affliction. He therefore took unusual care to ascertain whether there was testamentary capacity. He testified as follows:

"I did something on that occasion that I never did before and I never have done since. I made an effort, by examining this man John Derusseau as to his past history and his relatives and his property, to test his mental capacity, and to that end I went with him to the county judge's office—Judge Meadows was county judge—and I asked him a lot of questions in Judge Meadows's presence as to his history and his previous life, and after hearing his answers I returned to the office with him and then drew his will. And from his answers, upon his answers, I base my statement that he was at the time he executed his will of sound and disposing mind and memory."

At this interview in the presence of the county judge the proponent was not present.

It is urged by counsel that the will and accompanying agreement are evidence of undue influence; that it was unnatural and unfair to exclude all other relatives and to make *John Morneau* the sole beneficiary under the will. The testator was profoundly conscious of his sad condition and knew that he could not be a welcome inmate in the households of his brothers and sisters. His sister *Mrs. Dorsey* had requested that the *Morneaus* take him into their home.

Mrs. Craite went with the testator to her sister Mrs. Morneau and asked her to take care of him. We do not agree that it was unnatural for John Derusseau, under those circumstances, to make some provision with his little property by which his deplorable condition could be to some extent ameliorated, and we do not think that testamentary provisions of this character should be lightly set aside.

Under the circumstances, even if *John Morneau* had first suggested and requested that some arrangement be made by which he should be compensated for the burden he was to assume, that would not be sufficient proof of undue influence; but it is evident that the idea of some such provision had been entertained by the testator before he went to the home of *Morneau*. The testimony shows that the other relatives of the deceased had no peculiar claim upon his bounty. Mr. Craite testified that they were "financiers living off the interest of their money; they are not farmers; got money to live. They live in the city and are retired farmers. They are not business men."

It is argued that *Morneau* breached his contract by taking the testator to the insane asylum. He had borne the burden and responsibility of kindly caring for his brother-in-law for four years and eight months. The time then came when it was no longer practicable that he should remain in the household. *Morneau's* own son then had epileptic seizures which greatly complicated the situation.

We are satisfied with the finding of the trial judge that the will was not obtained by undue influence. Even if *John Morneau* did breach his agreement nearly five years afterward, that would not be ground for a contest of the will.

By the Court.—Judgment affirmed.

LYES, Appellant, vs. SUPERIOR SHIPBUILDING COMPANY and another, Respondents.

September 21—October 18, 1921.

Negligence: Contributory negligence: Mechanic testing repaired machinery: Question for jury.

1. In an action against a shipbuilding company for the death of an employee of an electric company who was killed while riding in the cabin of a crane in the plant of the shipbuilding company while it was being moved to test hoisting mechanism on which deceased had made repairs with the aid of two other skilled workers who were engaged with him in making the test, *held,* on the evidence as to his experience and knowledge of the dangerous conditions, that the question of contributory negligence on the part of deceased in putting his head in a dangerous position was for the jury.
2. The contention that deceased was subjected to a hidden danger in that the operator of the crane moved the cabin without giving notice, is *held* not well founded because the facts and circumstances warrant the inference by the jury that deceased knew the cabin must be moved and that he and the men in the cabin were there for that purpose.

DOERFLER, ESCHWEILER, and OWEN, JJ., dissent.

APPEAL from a judgment of the circuit court for Douglas county: W. R. FOLEY, Circuit Judge. *Affirmed.*

This action was brought by plaintiff for damages alleged to have been caused by the death of his son at the plant of the defendant company. The deceased was killed while riding in a cabin of a crane which he had been engaged in repairing and which was being moved to a position over a propeller wheel to test the lifting or hoisting mechanism which had been repaired.

Fred Lyes, the deceased, had been engaged in electrical and mechanical work for five years prior to his death. At the time of his death and for two and one-half years prior thereto he had been employed by the Benson Electric Company. On the day in question he had been sent to the plant of the *Superior Shipbuilding Company* with a workman

named Anderson to assist in the repair of a motor of a movable crane. Anderson asked that the deceased be sent with him because of his ability and knowledge in this work. At the plant of the defendant company they met defendant *Louis Facette*, who had had over twenty years' experience in the operation of the crane. The crane consists of a large steel frame 500 to 600 feet long, extending along a ship dock. Upon this frame there are tracks, and upon the tracks a movable bridge runs the long way of the frame. The bridge has a stationary arm about 200 feet in length extending out on either side of the frame, which is part of and moves with the bridge. The frame extends north and south and the arms of the bridge east and west. Upon this bridge there is a trolley which includes a cabin with motors and drums above the cabin, and the lifting device and hook with which the work is done. The cabin and hook move together with the trolley, the hook being to the west of the cabin. The operator of the cabin faces west and has three controllers in front of him which are connected with motors and work independently of each other, one to move the bridge along the frame either to the north or to the south, the second to move the trolley out upon the cross-arm either to the east or the west, and the third to raise or lower the hook in doing the work.

The trouble which Anderson and the deceased undertook to fix was with the controller and the motor which raised and lowered the hook. Deceased and Anderson first went over the blue-print of the electrical equipment and mechanism and then examined the motors and electrical equipment of the cabin. The cabin is reached by means of a stationary stairway up the frame and then by another stationary stairway up the bridge or traveling crane. At the top of this stairway and part thereof is a landing platform which is used to enter the cabin when the cabin is in position. The platform and stairway are supported from above by three-inch angle-irons. Anderson testified that the platform came

within about four inches of the door of the cabin, and the diagram introduced in evidence gives the distance as five inches.

In doing their work in the forenoon Anderson and the deceased were all over the cab. They finished their work of repairing the crane in the forenoon, but at the request of the defendant *Facette* returned in the afternoon to test the work of the hook in lifting, to be sure that the trouble had been remedied. They decided to move the crane over and pick up a propeller wheel which was lying upon the ground about one hundred feet south and thirty feet east of where the cabin was stationed. In order to reach the place where the propeller wheel lay and pick it up three movements were necessary: first, to move the bridge south to a point opposite the propeller; second, to move the trolley with the cabin and hook out to a point far enough east of the propeller so that the hook would be directly above it; and then to lower the hook and pick up the propeller. All three movements could be carried on at the same time. The ordinary way for the operation to be made was to start the bridge running south, then start the trolley out upon the cross-arm toward a point opposite the object to be lifted. The stairway and landing platform to the cabin being stationary upon the bridges, the cabin leaves it as it moves out upon the cross-arm.

The three men were in the cabin. Anderson threw on the switches, which had been disconnected, and asked *Facette* to "run it, everything is all right." *Facette* was standing or sitting at the west side of the cabin immediately in front of the controllers, facing the west window where he could lean out and see when he was properly placed. Immediately before starting the deceased had been standing entirely inside of the cabin and by the doorway at the south side thereof. *Facette* started the motor moving the bridge to the south and then started the motor moving the cabin and trolley out upon the cross-arm to the east. When the

cabin had moved the distance of about the width of the platform Anderson saw that the deceased had been struck or his head crushed between the east angle-iron supporting the platform and the door jamb of the cabin.

The jury found that the defendant *Facette,* the operator of the cabin, failed to exercise ordinary care in moving the cabin without giving a signal or warning; that the operator did not fail to exercise ordinary care in the manner in which he started the cabin; and that the deceased was guilty of contributory negligence. The trial court granted the defendants' motion for judgment upon the verdict, from which judgment appeal is taken.

For the appellant there was a brief by *Adams & Jones* of Duluth, Minnesota, attorneys, and *Powell & Sprowls* of Superior, of counsel; and the cause was argued orally by *C. E. Adams.*

For the respondents there was a brief by *Hanitch, Hartley, McPherson & Johnson* of Superior, attorneys, and *Kelley & Cottrell* of Cleveland, Ohio, of counsel; and the cause was argued orally by *C. J. Hartley.*

SIEBECKER, C. J. The jury's answer to question 5 shows that they found that Lyes, the deceased, was informed of the danger to his safety attending the operation of the crane at the time of the accident, and that he, as an ordinarily careful and prudent man, was guilty of a want of ordinary care in failing to protect himself from being injured by having his head caught between the angle-iron of the landing platform for entering the cabin and the jamb of the cabin door. The evidence tends to show that the deceased was an intelligent and experienced person in working about machinery and that he had several years' experience as a workman in the electrical business. He, with one Anderson, as heretofore stated in detail, worked in and about the cabin of the crane and passed up and down the stationary stairway attached to the frame and bridge and

leading to the door of the cabin in passing in and out of the cabin over the landing platform connected with the stairway, over which persons passed to go in and out of the cabin. The angle-irons supporting the platform were in plain sight to any one going in and out of the cabin. The jury was well sustained in concluding that the deceased understood the construction of the bridge, the arms of the crane, and the cabin with its different parts and apparatus. It is manifest from what transpired during the forenoon of the day in question and after Anderson, *Facette,* and deceased had returned to the crane after lunch to test the efficacy of the repairs made during the forenoon, that the deceased was informed that the crane was to be put into operation and that he was engaged with Anderson and *Facette* in making this test. Under these circumstances the jury was abundantly warranted in finding that the deceased was fully informed that the crane was to be operated to lift the propeller wheel which had been selected for testing the repairs on the crane. The evidence shows that the deceased participated in making the test; that the propeller was so located as to require the moving of the crane arms on the bridge and the cabin and the trolley and hook which was to be hitched onto the propeller wheel in order to lift it; that the deceased, Anderson, and *Facette* had entered the cabin to operate the crane to make the test; that *Facette* was in place to operate the controllers of the motors which operated the crane on the bridge, the cabin on the crane arm, and the trolley and hook for lifting the trolley wheel; that Anderson called to *Facette:* "Everything is all right—go ahead," and that *Facette* immediately started the motor to move the crane on the bridge and then started the motor that moved the cabin; that the cabin moved a few inches; that deceased's head was caught between the door jamb and the angle-iron, injuring him and causing his death. There is evidence tending to show that decedent was standing inside the cabin near the door immediately before these

movements of the crane and cabin started. The conditions surrounding him at this time were open and obvious, and he, as an intelligent and experienced man, must be held to exercise the degree of care for his protection from danger that an ordinarily careful and prudent person would exercise under the same or similar circumstances. Under the foregoing facts and circumstances surrounding this accident the decedent must be held to have had knowledge of all the obvious perils that threatened his safety which were discoverable by reasonable observation and the use of his senses.

It is contended that the decedent was subjected to a hidden danger in that the operator of the crane started the cabin without giving him notice thereof. This claim is not well founded because the facts and circumstances warrant the inference by the jury that decedent was informed of the necessity of moving the cabin or trolley with the hook in order to hitch onto the trolley wheel, and that he and his associates were in the cabin to do this very thing. We think under all of the facts it was a jury question whether or not decedent was guilty of a want of ordinary care in putting his head in the dangerous position which caused his death. We consider this question, under the facts and circumstances of this case, to be within the rule stated in *Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them." *Richmond & D. R. Co. v. Powers,* 149 U. S. 43, 13 Sup. Ct. 748.

It is considered that the circuit court properly submitted the contributory negligence question to the jury and that the judgment awarded on the verdict must stand.

By the Court.—The judgment appealed from is affirmed.

Doerfler, J. (*dissenting*). The deceased at the time of the accident was twenty-two years of age and had had about three years of experience as an electrical worker. The evidence does not show that the deceased had ever been employed before in repairing or installing electrical apparatus for cranes like the one on which he was injured, nor does it appear that he was familiar with the various movements of the crane and its parts.

On the morning of the day of the accident the deceased and Anderson examined the blue-prints of the crane, showing its electrical operation, and after that they ascended into the cab to examine the electric motor which operated the hoist, which motor was defective and out of order.

The deceased knew when he returned to the shipyard after dinner that he was there for the purpose of testing out the electrical motor that operated the hoist, in order to ascertain the efficacy of the repair work which he and Anderson performed during the morning. The deceased must also be presumed to have known that, in order to lift the propeller wheel, which was between 100 and 200 feet south of the cab and about thirty to forty feet east of the trestle, it would be necessary to utilize all of the motors. There is no testimony, however, to establish knowledge on the part of the deceased that the three movements involved in the test referred to would be performed simultaneously or that it was the usual and customary practice in the operation of the crane to so perform these movements.

There is nothing in the evidence to show that the deceased, in anything that he did, had occasion to examine into the location of the angle-irons on which the platform was suspended or to determine what portions of the crane moved with the cab when the same was operated out on the cross-arms. The impression that an ordinary person would obtain from the knowledge possessed by the deceased, in so far as it is disclosed by the testimony, is that the bridge

would be operated on the main tracks on the trestle until it arrived at a point opposite to where the propeller wheel was located, and that the cab would then be operated upon the cross-arm, and that that operation would be followed by the movement of the hoist. In any event the operation on the main track was first started, and the movement of the bridge thereon was not connected with any danger to the deceased while he was standing in the doorway or even if he extended his head beyond the doorway. Had the bridge continued in its course on the main track to a point opposite to where the propeller wheel was situated, before the motion of the cab on the cross-arm was called into play, there would have been ample justification for a jury finding the deceased guilty of contributory negligence if he had been injured by having his head caught between the door jamb and the angle-iron.

Contributory negligence is a defense, and must be proved by the defendant, unless the plaintiff by his own evidence establishes the fact that he was guilty of such negligence. *Grimm v. Milwaukee E. R. & L. Co.* 138 Wis. 44, 119 N. W. 833.

The answer of the jury to the fifth question of the special verdict is therefore based solely upon speculation and conjecture. On the evidence as it appears in the record the question of contributory negligence should not have been submitted to the jury at all, but, having been submitted, and answered in the manner as shown by the verdict, the answer should have been changed in accordance with the request of plaintiff's counsel.

ESCHWEILER and OWEN, JJ. We concur in the foregoing dissent.

LINDQUIST, Respondent, vs. DULUTH STREET RAILWAY COMPANY, Appellant.

September 21—October 18, 1921.

Street railways: Negligence: Collision with automobile at street intersection: Car traveling at unlawful speed: Contributory negligence of occupant of automobile.

1. In an action by a passenger in an automobile for injuries sustained in a collision with defendant's street car at a street intersection, where it appeared that the collision would not have occurred if the street car had been traveling within the maximum speed of ten miles per hour allowed by a city ordinance, the jury were justified in finding that defendant was guilty of negligence causing the injuries.
2. The evidence is also held to justify a verdict exonerating the driver of the automobile from negligence in proceeding to cross the railway tracks ahead of the street car, which was one hundred and twenty-two feet away when the automobile, traveling nine miles an hour, was forty-six feet from the point of collision, and the driver did not know the street car was approaching at a forbidden rate of speed.
3. Where the driver of the automobile was not negligent in attempting to cross ahead of the street car, plaintiff, confronted with the same conditions, was not negligent in taking no active steps to prevent him from crossing.

APPEAL from a judgment of the circuit court for Douglas county: W. R. FOLEY, Circuit Judge. *Affirmed.*

This action was brought for personal injuries sustained by the plaintiff on October 5, 1919, when a street car belonging to the defendant company and the automobile in which the plaintiff was a passenger collided at the corner of Twelfth street and Tower avenue in the city of Superior, Wisconsin. Tower avenue is a main traveled street and runs north and south; it is sixty feet wide from curb to curb and the sidewalk is twenty feet wide. Twelfth street runs east and west and intersects Tower avenue at right angles; it is forty feet wide and the sidewalks on Twelfth street are fifteen feet wide. The defendant company maintains two

parallel tracks on Tower avenue, the distance between the tracks being five feet. The distance from the curb to the rail is twenty-two and one-half feet.

At the time of the accident plaintiff was seated between two other women in the rear seat of a seven-passenger Chalmers car driven and owned by Arthur Dahlberg. After having driven to various places during the evening, Mr. Dahlberg stopped at Holden's Tire Shop on the south side of Twelfth street and about 150 feet east of Tower avenue; he then proceeded to the opposite side of Twelfth street to within three or four feet of the curb on the north side of Twelfth street, and then drove across Tower avenue, going straight west. As the rear wheels of the automobile cleared the first rail the street car struck the automobile, crushing in the side and top, bending the frame and breaking three wheels. The street car pushed the automobile forward a short distance, then moved the rear end to the left and off the track so that the automobile faced south, and then passed beyond the automobile. Plaintiff received the injuries complained of.

Plaintiff contends that the automobile was being driven with due care, but that the street car was being operated at a high, dangerous, and negligent rate of speed, contrary to the regulations of an ordinance of the city, and that the defendant neglected to give any warning of the approach of the street car. Defendant claims that the collision was caused by the negligence of the driver of the car in which plaintiff was riding, and that plaintiff and the driver were engaged in a joint enterprise and that plaintiff is therefore precluded from recovery in this action.

By a special verdict the jury in the case found that the motorman of the street car failed to exercise ordinary care in the operation of the street car before the collision; that this failure to exercise ordinary care was the proximate cause of the injury to the plaintiff; that no want of ordinary care on the part of the driver of the automobile contributed

to cause the plaintiff's injury; that the sum of money to compensate her for her injuries is $1,975.

Judgment was entered in conformance with the special verdict, from which judgment appeal is taken.

For the appellant there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

E. S. Geraldson of Superior, for the respondent.

Siebecker, C. J. An examination of the evidence shows that the jury was justified in finding that the street car in question was being operated at approximately a rate of speed of twenty-three and one-half miles per hour from the time it was in view of the driver of the automobile from the Twelfth-street crossing. This rate of speed was in violation of the city ordinance regulating the rate of speed of street cars at the place in question, which limited the speed to ten miles per hour. It is also shown that the driver of the automobile looked to see if a street car was approaching when he approached and drove onto Tower avenue and that he saw this street car coming from the south. The respective distances of the automobile and the street car from the point of collision at the time the automobile reached the curb line of Tower avenue required the automobile to travel forty-six feet while the street car traveled 122 feet. It is well established that the automobile was proceeding at the rate of nine miles per hour. Had the street car been traveling at a rate of speed not exceeding ten miles per hour, it is obvious that the automobile would have safely passed the street-car tracks at the place of collision.

Under the facts and circumstances shown, the jury was well sustained in concluding that the driver of the automobile did not know that the street car was traveling at a high and forbidden rate of speed at the time he had reached the curb of Tower avenue. In the light of the evidence the court properly refused to interfere with the verdict finding

defendant guilty of negligence in operating the street car immediately before the collision. Nor is the claim well founded that the verdict of the jury exonerating the driver of the automobile from negligence is not sustained by any evidence. It was clearly for the jury to determine upon the evidence adduced whether or not such driver was guilty of a want of ordinary care in operating the automobile and attempting to cross the street-car tracks in the manner he did. We discover no similarity in the evidentiary facts of this case and the facts involved in *Holdridge v. Mendenhall*, 108 Wis. 1, 83 N. W. 1109. As there stated:

"It was practically undisputed in the case that the boy unexpectedly stepped or ran in front of the car when only a few feet distant, and when it could not have been stopped, nor effective warning given, before it ran over him, whatever its speed."

The instant case presents no such conditions. It is considered that the court properly refused to set aside the verdict upon the ground that plaintiff omitted to pay attention to her safety in the attempt to cross the street-car tracks in front of an approaching car. As indicated, the conditions presented to the occupants of the car, under the facts and circumstances of the case, would be the same as those presented to the driver of the automobile, who, as the jury found, exercised due care. It logically follows that the plaintiff was not guilty of a want of ordinary care in taking no active steps to prevent crossing the tracks in the manner undertaken by the driver. We have examined the evidence and are satisfied that the damages awarded by the jury cannot be disturbed by this court as excessive.

By the Court.—The judgment appealed from is affirmed.

UNITED STATES CASUALTY COMPANY, Appellant, vs. SUPERIOR HARDWARE COMPANY, Respondent.

September 22—October 18, 1921.

Workmen's compensation: Salesman injured while soliciting orders: Service incidental to employment: Action by insurer against person causing injury: Findings of industrial commission: Admissibility: Automobiles: Negligence: Violation of the law of the road: Question for jury.

1. A city salesman whose duties did not require him to go to his employer's place of business before commencing work, and who was injured by an automobile truck while on his way to make his first business call, was "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats. *Schroeder & Daly Co. v. Industrial Comm.* 169 Wis. 567, followed.
2. Evidence tending to show that the automobile driver was at the time of the injury to the left of and beyond the center of the street in making a turn to the right, in violation of sec. 1636—49*b*, Stats., is *held* to make the negligence of the driver a question for the jury.
3. The findings of the industrial commission in proceedings on the salesman's claim for compensation were admissible in an action by a casualty company which paid the compensation and succeeded to the rights of the salesman against the person who caused the injury, where the complaint alleged that such a claim had been allowed and paid, and these allegations were put in issue by defendant's answer. The findings were not conclusive on the question of defendant's liability, but were *prima facie* proof of the facts stated in the complaint.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Reversed.*

One Louis Stern, a city salesman of the Eimon Mercantile Company of Superior, Wisconsin, was injured by an automobile truck. Upon due proceedings had before the industrial commission the amount of compensation and medical expenses under the workmen's compensation act was determined to be $3,144.92. Such sum was paid on behalf of the employer by this plaintiff, its insurer. Suit

was thereupon brought by the plaintiff as succeeding to all the rights of the injured person against the defendant on account of such accident.

Mr. Stern was employed to go from customer to customer along the streets of the city of Superior to solicit orders. Ogden avenue runs north and south in said city and is intersected by Broadway, running east and west. Mr. Stern left his home on the morning of September 26, 1919, according to custom, and went west on the south side of Broadway, and before reaching the center of Ogden avenue was struck and carried or pushed some distance to the south and near to the east curb of Ogden avenue.

The specific negligence here relied upon was the running by the auto truck to the left of and beyond the center of Ogden avenue in making the turn from the west to the right and south at the time of colliding with Mr. Stern and therefore in violation of sec. 1636—49*b*, Stats., which reads as follows:

"1. . . . Any such person so operating a motor vehicle shall, at the intersection of public highways, keep to the right of the center of such intersection of such highway when turning to the right. . . ."

Sub. 2 provides for a penalty by fine or imprisonment for a violation of the foregoing provision.

When plaintiff rested the court granted defendant's motion for a nonsuit. This upon two grounds: First, that under the situation disclosed Mr. Stern was not within the terms and conditions of the workmen's compensation act so as to be entitled to compensation from the employer for any such injury, and for that reason the plaintiff had no right of action; secondly, that it had not been made to appear that there was any actionable negligence in the operation of the car.

The plaintiff thereafter moved for a new trial, the motion

was denied, and judgment was thereupon ordered in favor of the defendant dismissing the complaint upon the merits. From such judgment plaintiff has appealed to this court.

For the appellant there was a brief by *Steele & Tipton* of Superior, and oral argument by *W. M. Steele.*

For the respondent there was a brief by *Pickering & Rieser* of Superior, and oral argument by *R. M. Rieser.*

Eschweiler, J. Mr. Stern's duty did not require him to go first to his employer's place of business before starting out to make the rounds of his customers in the city, and he had no other present objective in view while crossing Broadway and Ogden avenue at the time of the accident than the visit to his prospective first customer, whose place of business was on Broadway about a half a block west of the place of accident.

To entitle him to compensation from his employer under the provisions of sub. (2), sec. 2394—3, it must be shown that at the time of the accident "the employee is performing service growing out of and incidental to his employment." That such a city salesman, injured by an accident attendant upon his being upon the highway while soliciting orders for his employer, is so entitled to such relief, has heretofore been declared by this court (*Schroeder & Daly Co. v. Industrial Comm.* 169 Wis. 567, 173 N. W. 328), and under the ruling in that case this plaintiff's right to compensation would be beyond question if, at the time of the accident, he had reached a point in his daily journey beyond the first customer and on the way to another.

We can see no substantial ground for holding that the liability of the master should be any less in the situation here disclosed than that in the case just above cited. Mr. Stern not being required to first report to and then start from the employer's place of business in the performance of his services must be, and is now so held to have been, in

the course of his employment at the time of this particular accident.

We are satisfied that such conclusion is also well supported by the following decisions: *Milwaukee v. Fera,* 170 Wis. 348, 174 N. W. 926, where the employee of a city garbage collector was driving back to his employer's barn after his last load for the day; *Moran's Case,* 234 Mass. 566, 125 N. E. 590, where a solicitor and collector for a life insurance company was fatally injured while running to catch a street car; *Globe Ind. Co. v. Industrial Acc. Comm.* 35 Cal. App. 89, 171 Pac. 1088, a bookkeeper injured by an automobile as he was crossing a public street to mail a letter for his employer; *Kunze v. Detroit S. T. Co.* 192 Mich. 435, 158 N. W. 851, a supervising foreman on his way in the usual course of his employment from inspecting work being done by defendant at one place to another; *In re Harraden,* 66 Ind. App. 298, 118 N. E. 142, where a fire insurance agent whose duties required him to travel from one city to another was injured by slipping on the sidewalk on his way from the train to the hotel.

We have examined the cases cited and relied upon by respondent claimed to support the contrary view, but we do not deem them applicable to the present situation and certainly not controlling here or necessary to be discussed.

We are also forced to the conclusion that the nonsuit cannot be supported upon the second ground upon which it was placed by the trial court. By the testimony of the defendant's president on adverse examination it was defendant's automobile truck that caused the injury. The testimony of Mr. Stern is sufficient to warrant the conclusion that at the time of the collision he was east of the center of Ogden avenue. If the auto truck came on Broadway from the west at the time, the inference would be proper that in so doing it had violated the law of the road quoted above. A witness who was walking south on Ogden avenue at the time

of the accident and had passed Mr. Stern at Broadway and who subsequently assisted in removing Mr. Stern from under the truck testified that there was an auto truck resembling the one causing the injury at a point on Broadway west of Ogden avenue, and that at such time he saw no other approaching automobile. We think there was sufficient evidence to require the submission of the issues involved to the jury.

Complaint is made by defendant of the reception in evidence, on plaintiff's offer, of the findings made by the industrial commission in the proceedings upon the claim for compensation by Mr. Stern against his employer and the plaintiff as its insurer. Being in the nature of a judgment or final determination of a dispute between other parties, it could not be considered conclusive upon the question of defendant's liability herein. It could be properly considered, however, as at least making *prima facie* proof of the facts necessarily alleged in the complaint herein, viz. of claim having been made by Mr. Stern against the employer and that the claim had been allowed and paid, and such allegations being put in issue by defendant's answer. *Grand Rapids L. Co. v. Blair,* 190 Mich. 518, 526, 157 N. W. 29; *Oceanic S. N. Co. v. Compania Transatlantica Espanola,* 134 N. Y. 461, 469, 31 N. E. 987; Jones, Ev. (2d ed.) § 590; 23 Cyc. 1271; 15 Ruling Case Law, 1021.

The judgment of nonsuit therefore having been improperly granted, plaintiff's motion for a new trial should have been allowed.

By the Court.—Judgment reversed, and the cause remanded for further proceedings, and a new trial granted.

DELANEY and another, Appellants, vs. GLOBE SHIPBUILDING COMPANY, Respondent.

September 21—October 18, 1921.

Sales: When title passes: Intention of parties: Steamboat in deliverable condition: Risk of loss.

1. The time when a transfer of title under a sale contract takes place depends on the intent of the parties, which may be determined by the written evidence, or, if the matter is left in doubt, by the statements of the parties, subject to the limitations on the reception of parol evidence, and by the surrounding circumstances.
2. In view of sub. 1, sec. 1684*t*—19, Stats., title to a tug sold unconditionally while afloat in a harbor tied to the seller's dock, the tug being in a deliverable condition, passed immediately to the buyer, at whose risk it was when afterwards sunk, though the seller failed to notify the buyer of the fact that it had sunk prior to the time he had made full payment of the purchase price.
3. A bill of sale describing defendant as owner and that he had bargained and sold, and "by these presents do bargain and sell," is regarded as merely formal evidence of the bargain which had taken place some time before.

APPEAL from a judgment of the circuit court for Douglas county: W. R. FOLEY, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing the plaintiff's complaint.

This is an action to recover damages sustained by the plaintiffs, resulting from the sinking of a tug in Superior harbor at the defendant's dock and of which the defendant had been the owner. On February 23, 1920, it was afloat in Superior harbor, tied to the defendant's dock, and had been advertised for sale. Negotiations between the plaintiff *Delaney* and McKellar, defendant's manager, were carried on at the yard in Superior after an examination by the plaintiff. The following memorandum was made:

"GLOBE SHIPBUILDING COMPANY.

"Superior, Wisconsin, Feb. 23, 1920.

"Received from *Capt. Delaney* the sum of $10 as part

payment of the steamer Globe, the balance of $2,740 to be paid within thirty days from date.

"James McKellar."

Plaintiff then returned to Buffalo, New York, his home, nothing further being done about the possession or delivery. Plaintiff stated that he would be back about April 1st. The next communication was a telegram as follows:

"James M. Kellar, Buffalo, N. Y., Mar. 17, 1920.

"*Globe Ship Co.*, Superior, Wis.

"Will mail you Monday Chicago draft for balance due on tug Globe. Any one making inquiry of her value please place her value eighty-five hundred dollars. Kindly keep her equipment oil in tank and close watch of her until I reach there about April seventh.

"Capt. Wm. Delaney."

This telegram was not answered. The next communication was a telegram as follows:

"Buffalo, N. Y., March 23, 1920.

"*Globe Shipbuilding Co.*,

"Superior, Wis.

"Wiring you Postal Telegraph today eighteen hundred dollars account tug Globe make draft bill of sale attach for balance nine hundred forty dollars through Manufacturers and Traders Bank Buffalo make bill of sale read eighty-five hundred to *Captain William Delaney* James J. Pendergast and Company. Captain William Delaney."

Defendant received in due course the $1,800 and did not reply.

Owing to the condition of the tug in the ice the water overflowed, and on March 19th the tug began to sink, and sunk on March 22d. On April 2d plaintiff wrote to defendant that the bill of sale and draft had not arrived and also wrote that he had heard rumors that the boat was not in good condition, that her frames were broken and deck beams badly rotted and that the engine was of no account. On April 8th plaintiff paid the final draft in Buffalo. In a letter dated April 9th defendant expressed surprise at the reports of the condition of the tug and stated that the de-

fendant had made no guaranty of the condition of the vessel and that the condition did not enter into the sale, and that they had not been called on to make any statements relative to the boat. The letter also stated that the draft for the balance had not been received. When the defendant made his draft for the balance there was attached to it a bill of sale. This bill of sale was in ordinary form, describing the defendant as sole owner and that defendant had bargained and sold, "and by these presents do bargain and sell," etc. On April 22d plaintiff arrived in Superior. He had had no notice whatever that the boat had sunk. He then requested McKellar to raise the tug. McKellar said he would have nothing to do with it, and said that plaintiff had salvage enough in the boat to pay him. There was evidence that the expense of raising the tug and other items amounted to $1,800. The court submitted but one question to the jury, namely, the question of how much the market value of the tug was decreased by the sinking.

For the appellants there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

For the respondent there was a brief by *Hanitch, Hartley, McPherson & Johnson* of Superior, and oral argument by *C. J. Hartley.*

JONES, J. It was alleged in the complaint that it was mutually agreed that the defendant should sell the tug for the sum of $2,750 "and deliver the same upon full payment of the purchase price in the condition in which it was at the date of said agreement and at the defendant's dock, afloat and anchored thereat," and that it was "understood and agreed between the parties that defendant would retain possession of said tug until the full payment of said purchase price was made, and preserve the same from damage or loss, and upon full payment of said purchase price deliver said tug to plaintiffs at the place and in the condition in which said tug was at the time of making said agreement."

There was no evidence of any such agreement, and the case was tried by the plaintiff on the theory that without any such agreement the title and the risk remained in the defendant until the execution of the bill of sale. There was no parol testimony showing the intention of the parties as to the date of the delivery or the time when the title should pass. It is elementary that the time when the transfer of the title takes place depends upon the intent of the parties to the contract. That intention may be determined by the written evidence, and, if the subject is left in doubt, intention may be shown by the statements of the parties, subject to the limitations governing the reception of parol evidence and by the circumstances surrounding the transaction.

Plaintiffs' counsel lay great stress upon the claim made by them that there was no delivery of possession, that no actual possession was given and could not be given, and that this bears upon the question of intention.

Under the conditions existing when the memorandum of sale was made, the following section of the statute is very significant:

"Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed." Sec. 1684*t*—19.

This was undoubtedly an unconditional contract of sale of specific goods. We see no reason why the tug was not in a deliverable state on the 23d of February, and the fact that it may not have been then practicable to remove the boat to Buffalo seems to us immaterial.

In a very recent case this section of the statute was construed by this court. It was a case perhaps involving more difficulty than the instant case, since the claim was vigorously made that the sale was conditional. In the opinion by Mr. Justice Rosenberry it was said:

"Whether or not the title to the goods described in the contract passed to the defendant depends upon the intention

of the parties. Sec. 1684*t*—18, Stats. The contract itself does not in terms say when the title should pass. Recourse must be had, therefore, to rules of construction. Sec. 1684*t*—19 establishes the rules for ascertaining the intention of the parties as to the time at which the property in goods is to pass to the buyer where there is no specific provision in the contract. . . .

"In this case the goods were ascertained and in a deliverable state. The buyer had the right at any time before June 1, 1920, upon payment of the remainder of the purchase price, to take the goods, and if the plaintiff had, upon tender being made to it, refused to deliver the goods, the right of the defendant to recover the same in an action of replevin would have been complete." *Boscobel v. Muscoda Mfg. Co., ante,* p. 62, 183 N. W. 963.

Plaintiffs' counsel argue that it must have been the intention of the parties that further acts were to be performed before the transfer of title should take place—at least that a bill of sale was to be executed; but no mention of a bill of sale was made until more than a month after the bargain was made. It is also contended that the language in the bill of sale in which the defendant is described as owner and the words of bargain and sale afford evidence that the title had not been transferred, but we regard the bill of sale as merely formal evidence of the bargain which had been made on February 23d.

Plaintiffs' counsel argue that, whatever may have been the technical rights of the parties, the defendant was guilty of such concealment and fraud that it should respond in damages. There is no claim that the defendant was in fault for the sinking of the tug. This was the result of natural causes for which neither party was to blame. When the defendant heard of the danger it did what it could to prevent it pursuant to the telegram of March 17th.

In these transactions neither party seemed to be acting from purely altruistic motives. On the one hand the defendant failed to notify the plaintiff of the condition of the tug. On the other hand, plaintiff *Captain Delaney*

requested defendant to place the value of the tug at $8,500 to any one making inquiry, and he caused that amount to be placed in the bill of sale as the consideration although the purchase price was only $2,750. There was testimony that he had told his associates that he had paid $8,500.

The defendant insisted that the tug was at the risk of the plaintiff after February 23d. In view of the statute and the authority above quoted we consider that this claim rested upon solid ground, and it cannot be said that he was guilty of any actionable fraud.

We agree with the trial court that the title passed on February 23d. Defendant's counsel argue that even if this was not true, plaintiff would be prevented from recovering by sub. 2 (b), sec. 1684*t*—8, Stats., because the contract was for the sale of specific goods and indivisible, and that since plaintiff did not elect to rescind and recover the purchase money paid, but took the boat in its damaged condition, he was bound to pay the purchase price. In view of the conclusion we have reached it is not necessary to consider this question.

By the Court.—Judgment affirmed.

CUNNIEN, Respondent, vs. SUPERIOR IRON WORKS COMPANY and another, Appellants.

September 22—October 18, 1921.

Automobiles: Negligence: Collision with person descending from wagon: Failure to keep lookout: Sounding of horn: Contributory negligence: Questions for jury: Damages: Payments by third persons.

1. It is the duty of the driver of an automobile to keep a reasonably careful lookout that he may be able to avoid a collision; and the question whether he has fulfilled his duty in regard to watching for pedestrians and other persons is generally for the jury.

2. While no rule of law requires the driver of an automobile to sound his horn on approaching a street intersection, the statute provides that the automobile be equipped with a suitable horn or signal device; and the purpose of the statute was to enable a driver to give proper warning under any circumstances where such warning would avert an accident.
3. Where defendant, driving an automobile in broad daylight on a wide, paved street, overtook a dray upon which plaintiff was riding, and when the dray stopped turned to the left to pass it, and in passing came unnecessarily so close to the dray as to strike the plaintiff while he was alighting from it, the question of the negligence of the defendant in failing to keep a proper lookout and in not giving warning of his approach is for the jury.
4. Whether plaintiff was contributorily negligent in descending from the dray on the side towards the street and not next to the curbing and placing one foot down on the pavement without looking for automobiles, is a question for the jury.
5. Under the federal Vocational Rehabilitation Act (40 U. S. Stats. at Large, 617, ch. 107) no deduction should be made from the damages awarded by a jury for personal injury because of compensation received by the plaintiff during a portion of the time he was disabled.

APPEAL from a judgment of the circuit court for Douglas county: W. R. FOLEY, Circuit Judge. *Modified and affirmed.*

The appeal is from a judgment in favor of the plaintiff and against the defendants, and cross-appeal by the plaintiff.

Ogden avenue is a paved street in the city of Superior extending north and south, and at the point of the accident is forty feet wide from curb to curb, and is intersected by Belknap street at right angles, there being on said last named street a line of street cars.

The plaintiff at the time of the trial in September, 1920, was twenty-two years of age, and had been a railroad car-seat upholsterer from the time he was seventeen years of age until he arrived at the age of twenty years, when he enlisted in the United States navy in the month of April, 1917. On July 19, 1919, while on a furlough, he came to Superior and assisted a drayman by the name of Young in the moving of his mother's furniture from her former home

in the city of Superior to the freight depot. Immediately prior to the happening of the injury the dray on which the plaintiff and the driver, Young, were seated was returning from the freight yards empty, the dray being driven south on the west side of Ogden avenue, the horse going at a slow trot or walking up to the point where it stopped, about ten feet north of the north crossing at the intersection of Belknap street, in order to permit the plaintiff to alight from the wagon. The dray box had sides to it about two feet high and the seat was elevated about five and one-half feet from the street. The driver sat on the right-hand side of the seat, while the plaintiff sat on the left-hand side.

There is very little dispute in the evidence as to the actual facts in the case. The defendant *Hayes,* who was the president of the defendant company, immediately preceding the accident was driving a single-seated six-cylinder Saxon car, used in the business of the defendant *Superior Iron Works Company,* south on Ogden avenue, from the Y. M. C. A. building, and when he caught up with the dray, which had stopped as stated, within a distance of about ten feet from the north crossing of Ogden avenue and Belknap street, turned to the left in order to pass the dray and thereafter proceed on his course. Immediately after the dray had been stopped the plaintiff started to alight therefrom, and in doing so faced the west and stepped down backwards, first stepping on the tongue of the wagon with one foot, then with the other foot on the hub, and then down onto the pavement. He still clung with his hands to the dray at the time of the accident, and it appears from the evidence that he had alighted on the pavement with only one foot, such foot being a distance of about a foot east of the wagon wheel, the other foot being still on the hub of the wheel. While the plaintiff was so alighting the defendant *Hayes* was passing around the dray towards the east, and in proceeding along the highway came so close to the dray that his automobile struck the plaintiff, causing

him to be thrown upon the pavement and to sustain the injuries complained of.

It also appears quite conclusively that immediately prior to the happening of the accident the automobile was driven at a rate of speed between seven and eight miles an hour and that no horn or signal was blown or sounded to attract the attention of the plaintiff or to warn him of the approach of the machine.

The testimony also shows that the plaintiff, prior to the time he attempted to alight from the dray, did not look towards the north in order to discover the approach of an automobile.

After the collision the automobile of the defendant *Hayes* swerved off to the left, across Ogden avenue, and stopped close to the east curb. There were no automobiles excepting the one in question going along either side of Belknap street, and the evidence shows that there was little traffic at the time in question on either of the streets.

The case was submitted to the jury on a special verdict, and the jury found in its answer to question number 2 that the defendant *Hayes* failed to exercise ordinary care in the operation of the automobile as it approached and collided with the plaintiff; and in answer to question number 3 found that such failure to exercise ordinary care was the proximate cause of plaintiff's injury; and also found that no want of ordinary care on the part of the plaintiff proximately contributed to produce the injury.

The defendants contend, first, that there was no evidence in the case under which they could be found guilty of negligence, and second, that the evidence in the case conclusively shows that the plaintiff, at the time of the happening of the accident, was guilty of contributory negligence, and that therefore defendants' motion for nonsuit or for the direction of a verdict should have been granted; and that after verdict the answer to the question in which it was found that the defendant *Hayes* was guilty of negligence should

have been set aside; that such answer should have been changed from "Yes" to "No;" that the answer by which the plaintiff was held to be free from contributory negligence should have been changed from "No" to "Yes;" and that judgment should have been entered in favor of the defendants and against the plaintiff dismissing plaintiff's complaint, etc.

For the appellants there was a brief by *Pickering & Rieser* of Superior, and oral argument by *R. M. Rieser.*

For the respondent the cause was submitted on the brief of *Dietrich & Dietrich* of Superior.

Doerfler, J. Did the evidence warrant submission of the question involving defendants' negligence to the jury?

The accident happened at about noontime on a clear day in the month of July. The defendant *Hayes,* with his automobile, was coming along the west side of Ogden avenue, and from the time that he approached the dray up to the time of the happening of the accident the dray and the occupants thereof were fully within his view. The machine was driven at a rate of speed between seven and eight miles per hour, and, assuming that the appliances on the machine were in proper order, the machine was at all times within the easy control of the driver, so that he could readily pursue any course, by either swerving his machine to the left a sufficient distance away from the dray or by stopping it, and thus avoid the accident.

It is the duty of the driver of a machine to keep a reasonably careful lookout so that he may be able to avoid a collision, and whether a driver has fulfilled his duty in regard to watching for pedestrians and other persons is generally a question for the jury. Huddy, Automobiles (5th ed.) sec. 332.

Sec. 1636—52, Stats., among other things, provides:

"Every automobile . . . while being used upon any public highway of this state, shall be provided with efficient brakes and an adequate bell, horn or other signal device."

The legislature evidently realized the necessity for enacting a provision requiring the presence of a suitable horn or signal device upon every automobile propelled along the streets in this state, and the only object and purpose which that body could have had in mind in the enactment of such a precaution was to enable the driver of a machine to give a proper warning of his approach under any circumstances, where such warning would be liable to prevent an accident.

It is true that this court has held that there is no rule of law which requires an automobilist to sound his horn in approaching a street intersection; however, that was not intended to convey the idea that the horn or signal device was a useless appliance, but that a warning or signal by use of such horn or device would be necessary, in the exercise of reasonable care, wherever there was anticipated danger which could be averted by the giving of a proper timely signal. Therefore the matter of the negligence of the defendant presented a proper question for the jury, both upon the theory that the defendant *Hayes* did not keep a proper lookout and that he did not seasonably, by means of his automobile horn, sound a warning of danger. Furthermore, while going at the rate of seven or eight miles an hour and under circumstances from which it must be assumed that he had full control of his machine, it is very questionable indeed whether he could not be deemed guilty of negligence, under the circumstances, in driving his machine so close to the dray while passing it as to leave a space of but one foot between his machine and the wheels of the dray. As stated, there was no other vehicle or pedestrian on Ogden avenue; the street was forty feet wide; the dray stood between one and three feet from the west curb of Ogden avenue, and there was ample space, even on the west side of the street, for the defendant *Hayes* to pass the dray without in any way endangering the plaintiff under the circumstances detailed herein. This also was a proper matter to submit to the jury under all the facts and circumstances in the case in order to determine the question

of negligence. The question of the negligence of the defendant *Hayes,* if any, was therefore properly submitted to the jury.

Questions of negligence arising out of automobile accidents are peculiarly for the jury and will not be decided as a matter of law except under the clearest circumstances. *Groeschner v. John Gund B. Co.* 173 Wis. 366, 181 N. W. 212.

What was said in the case of *Shortle v. Sheill,* 172 Wis. 53, 178 N. W. 304, is strictly applicable to the instant case:

"There is no yard-stick by which it may be determined whether any given action amounts to ordinary care. The decision must of necessity be a matter of human judgment. This is signally true in automobile accident cases. Whether the conduct of one charged with responsibility for an automobile accident amounts to negligence is in the vast majority of cases a question calling for the exercise of human judgment and one upon which men are very likely to differ. In these days, when automobiles are in well-nigh universal use, who is better qualified to pass final judgment upon such matter than a jury, who can apply to the facts of the case a collective and varied experience? The daring, the reckless, the moderate, the careful, and the timid driver, as well as the pedestrian and he who still clings to Old Dobbin, all find their way to the jury box, and the decision of the jury upon these questions reflects a judgment founded upon varied views, sympathies, and experiences which a court can disregard only when palpably unsupported by evidence or inconsistent with law."

We come now to the question submitted to the jury in the special verdict involving the contributory negligence of the plaintiff. In this connection it must be borne in mind that the plaintiff did not look towards the north before climbing down from the wagon and that he proceeded to climb down backwards in the manner heretofore stated. To hold that the plaintiff would be guilty of contributory negligence as a matter of law, under the facts and circumstances detailed in the evidence, would appear to establish a very harsh rule

indeed. In determining the question of negligence the traffic on the street must be taken into consideration, the width of the street, and all the surrounding facts and circumstances. It is true, had the plaintiff after alighting, with one foot on the pavement, proceeded without looking to cross the highway and then had been struck, it would be quite clear that under the decisions there would be little difficulty in finding that he was guilty of contributory negligence as a matter of law. However, in the instant case he had only partially alighted from the vehicle. There is sufficient evidence to warrant the conclusion that the foot which had settled on the pavement was not to exceed one foot distant from the dray. The injury would have resulted even though it had been the intention of the plaintiff to pass forward towards the south around the wagon and to gain access to the west sidewalk in that manner; or it would have happened if he had merely stepped down from the dray and had stood within one foot of the dray intending to discuss some matter with the driver; or if he had alighted from the dray for the purpose of either examining some portion of the dray on the traffic side or of attending to some slight repair upon the wagon. It would seem that whether or not the plaintiff was guilty of contributory negligence in doing what he did at the time of the happening of the collision presented a situation which, like the negligence of the defendant *Hayes*, constituted a proper jury question. At least it has been so held by courts of last resort of eminent respectability. *Deitchler v. Ball*, 99 Wash. 483, 170 Pac. 123; *Undhejem v. Hastings*, 38 Minn. 485, 38 N. W. 488; *Kathmeyer v. Mehl* (N. J.) 60 Atl. 40.

While other courts of eminent standing have held to the contrary doctrine in cases somewhat similar to the instant case, the very fact that there should be a dispute among learned judges upon the question involved in this case on contributory negligence would make it appear clear that under the rulings of this court the matter of contributory

negligence is a proper subject to be submitted to and decided by a jury; and what has been quoted and said in the case of *Shortle v. Sheill, supra,* is equally applicable to the question of the plaintiff's contributory negligence as it is with respect to the negligence of the defendant *Hayes.* We have arrived at this conclusion not without considerable difficulty, but after mature consideration. In view of our former holdings and what has been heretofore said and referred to, we hold that the contributory negligence of the plaintiff is a proper matter to be submitted to the jury.

In answer to the fifth question of the special verdict, namely, "What sum will fairly compensate plaintiff for the damages he has sustained?" the jury answered "$3,250." The jury further answered that of said amount the sum of $1,500 is allowed as damages for loss of earnings since March 8, 1920, and judgment was rendered in favor of the plaintiff and against the defendants for the sum of $1,725 and costs, etc.

The plaintiff in his cross-appeal contends that it was error for the trial court to deduct the sum of $1,500 from the total amount of the damages, namely, $3,250, and to render judgment as aforesaid.

The plaintiff's injury consisted of a simple fracture of the tibia of the right limb, about an inch below the knee joint. Dr. Ground testified that the bone at the point of the injury, in hardening ossifies separately from the shaft and the part which involves the new joint. The injury twisted and bent the bone at the joint, and the ligaments lifted the epiphyllum cap off the shaft of the bone. That is what is called an epiphysical fracture. It is a weak point naturally, and the two pieces of the bone do not become ossified or thoroughly fastened together until the person becomes twenty-four or twenty-five years of age, and then they become very firm, and the injury was such as to bend the bone and lift the shaft right off of the tibia. The doctor treated the plaintiff about two months in St. Mary's

hospital at Superior, and thereafter, when the plaintiff went to St. Paul, he still had some retentive dressing on his limb. The injury will naturally constitute a weak place for a few years. The fact that the bone has been immobilized for so long a time makes the joint stiff and the tissues around the joint have become thickened, and that thickening has to be absorbed before the joint can be used normally, and that always takes a considerable time. The doctor further testified that he would expect it to take a year, or possibly a year and a half, before conditions would become reasonably normal.

The plaintiff testified that since his injury he was able to work, with great difficulty, inconvenience, and pain, at his regular employment for a period of about one week, for which he earned the sum of $34, but that the condition of his limb was such as to prevent him from continuing in his employment, and that such disability continued up to the time of the trial.

In December, 1918, the plaintiff filed his application for a discharge from the navy, and his four-year term was changed automatically to one which continued during the duration of the war. He received his discharge from the navy on October 29, 1919. From the time of the happening of the injury up to the time of his discharge from the navy the plaintiff received his usual compensation from the government amounting to $45 a month.

The plaintiff thereafter presented an application for vocational training under an act of Congress, and for a period of one year thereafter, under the provisions of said act, he was afforded an opportunity to improve himself in the business of general upholsterer so as to enable him to pursue a gainful occupation. The work required under the Vocational Rehabilitation Act was not so strenuous, nor did it require the person to kneel or to stand to any considerable degree while so employed. Under this Vocational Rehabilitation Act the plaintiff received from March 8, 1920, the

sum of $120 per month, and for a portion of the time his employer paid him the sum of $6 per week, which was subsequently raised to $10 per week.

The lower court instructed the jury that inasmuch as the government paid plaintiff's salary of $45 a month to him until the time of his discharge on October 29, 1919, nothing was to be allowed to him prior to said date for loss of earnings. The jury was further instructed that in arriving at plaintiff's loss of earnings they were to leave out of consideration the $120 per month which the plaintiff received from the government under the Vocational Rehabilitation Act, and find his loss of earnings, if any, just the same as if he did not receive any money from the government.

Plaintiff testified that since his injury and up to the time of the trial he would have been able to earn seventy-two and one-half cents per hour in his former occupation had he been able to resume it, and that since plaintiff was injured the compensation for railway car upholsterers has materially increased.

The jury was instructed also by the lower court to answer separately the amount awarded to the plaintiff for damages since March 8, 1920, and the jury fixed said sum at $1,500, and this amount was subsequently in the judgment deducted from the total amount of the plaintiff's damages as aforesaid.

The plaintiff in his cross-appeal now raises the question that in making such deduction the court committed error, and that the total damages should be by the judgment fixed at $3,250 instead of $1,725.

The Vocational Rehabilitation Act, which was enacted on June 27, 1918 (40 U. S. Stats. at Large, 617, ch. 107), among other things provides as follows:

Sec. 2. "Every person who is disabled under circumstances entitling him, after discharge from the military or naval forces of the United States, to compensation under article III of the act entitled 'An act to amend an act entitled

"An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,"' approved October sixth, nineteen hundred and seventeen, hereinafter referred to as 'said act,' and who, after his discharge, in the opinion of the board, is unable to carry on a gainful occupation, . . . shall be furnished by the said board, where vocational rehabilitation is feasible, such course of vocational rehabilitation as the board shall prescribe and provide.

"The board shall have power, and it shall be its duty, to furnish the persons included in this section suitable courses of vocational rehabilitation to be prescribed and provided by the board, and every person electing to follow such a course of vocational rehabilitation shall, while following the same, receive monthly compensation equal to the amount of his monthly pay for the last month of his active service, or equal to the amount to which he would be entitled under article III of said act, whichever amount is the greater. If such person was an enlisted man at the time of his discharge, for the period during which he is so afforded a course of rehabilitation, his family shall receive compulsory allotment and family allowance according to the terms of article II of said act in the same manner as if he were an enlisted man, and for the purpose of computing and paying compulsory allotment and family allowance his compensation shall be treated as his monthly pay: Provided, that if such person wilfully fails or refuses to follow the prescribed course of vocational rehabilitation which he has elected to follow, in a manner satisfactory to the board, the said board in its discretion may certify to that effect to the bureau and the said bureau shall, during such period of failure or refusal, withhold any part or all of the monthly compensation due such person and not subject to compulsory allotment which the said board may have determined should be withheld. . . .

"No compensation under article III of said act shall be paid for the period during which any such person is furnished by said board a course of vocational rehabilitation except as is hereinbefore provided."

Article III above referred to provides for compensation to be paid on account of the death of one serving in the army or the navy or for partial or total or temporary or permanent disability.

Article II of the act, entitled "War Risk Insurance," provides for compulsory and voluntary allotments for the benefit of the wives and families, which allotments are deducted and paid directly by the government to the dependents.

Sec. 18, ch. 104, 40 U. S. Stats. at Large, p. 613, pertaining to war risk insurance, provides as follows:

"(1) That if an injury or death for which compensation is payable under this article is caused under circumstances creating a legal liability upon some person other than the United States or the enemy to pay damages therefor, the director, as a condition to payment of compensation by the United States, may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person, or if it appears to be for the best interests of the beneficiary the director may require him to prosecute the said action in his own name, subject to regulations. The director may require such assignment or prosecution at any time after the injury or death, and the failure on the part of the beneficiary to so assign or to prosecute said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned to the United States may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be placed to the credit of the military and naval compensation appropriation. If the amount placed to the credit of such appropriation in such case is in excess of the amount of the award of compensation, if any, such excess shall be paid to the beneficiary after any compensation award for the same injury or death is made."

In the next paragraph this section provides that if a recovery has been had as the result of the suit brought or of a settlement, the amount so obtained shall be credited upon any compensation payable or which may become payable to such beneficiary. Said section further provides:

"(2) If an injury or death for which compensation may be payable under this article is caused under circumstances

creating a legal liability upon some person, other than the United States or the enemy, to pay damages therefor, then, in order to preserve the right of action, the director may require the conditional beneficiary at any time after the injury or death, to assign such right of action to the United States, or, if it appears to be for the best interests of such conditional beneficiary, to prosecute the said cause of action in his own name, subject to regulations. The failure on the part of the beneficiary to so assign or to prosecute the said cause of action in his own name within a reasonable time, to be fixed by the director, shall bar any right to compensation on account of the same injury or death. The cause of action so assigned may be prosecuted or compromised by the director, and any money realized or collected thereon, less the reasonable expenses of such realization or collection, shall be paid to such beneficiary, and be credited upon any future compensation which may become payable to such beneficiary by the United States on account of the same injury or death."

On June 5, 1920, ch. 253 (41 U. S. Stats. at Large, p. 1021) was enacted by Congress, which among other things provides as follows:

"That the board may, after June 30, 1920, pay, subject to the conditions and limitations prescribed by section 2 of the Vocational Rehabilitation Act as amended, to all trainees undergoing training under said section residing where maintenance and support is above the average and comparatively high, in lieu of the monthly payments for maintenance and support prescribed by section 2, as amended, such sum as in the judgment of the said board is necessary for his maintenance and support and for the maintenance and support of persons dependent upon him, if any: Provided, however, that in no event shall the sum so paid such person while pursuing such course be more than $100 per month for a single man without dependents, or for a man with dependents $120 per month, plus the several sums prescribed as family allowances under section 204 of article II of the War Risk Insurance Act."

The federal statutes above quoted and referred to make it clear that Congress first intended to provide for those engaged in the military and naval service, and who had

sustained injury, compensation for disability, which compensation matured after the discharge of the soldier or sailor, and which compensation was subject to compulsory allotment for the benefit of dependents in the same manner as the compensation received in the form of monthly pay was subject while such soldier or sailor was in service.

Article III above referred to is a separate and independent article and has no connection with article IV, which provides for soldiers' and sailors' insurance. It is very clear that Congress had in mind, at the time of the enactment of the foregoing statutes, not only to relieve in a measure those who had served the government during the period of the war, but also to afford them some compensation by way of appreciation and gratitude for the great sacrifices made. And it cannot logically be maintained that these enactments were brought about or had in view any thought of relieving those who were guilty of wrongdoing towards any one engaged in the military or naval service of the United States.

The plaintiff, after his discharge, from March 8, 1920, took advantage of the statutes pertaining to vocational rehabilitation and received the maximum provided for under said statute, and in addition thereto received from his direct employer, up to the month of July, 1920, the sum of $6 per week by way of additional compensation, and thereafter the sum of $10 per week.

Sec. 2 of the act of 1918, referred to above (40 U. S. Stats. at Large, 617, ch. 107), provides that no compensation under article III of said act shall be paid for the period during which any such person is furnished by said board a course of vocational rehabilitation, showing that the amount allowed by way of compensation during the vocational rehabilitation period is substituted for the amount of the compensation provided for in article III; and said last named section also provides that in order to enable one to take advantage of the Vocational Rehabilitation Act he must have

been disabled under circumstances entitling him, after discharge from the military or naval forces, to compensation under said article III. So that the Vocational Rehabilitation Statutes really act for the time being as a substitute for and a supplement to the provisions of said article III, and under said article III all causes of action and all amounts recovered belong to the United States and must be ultimately credited to the military and naval compensation appropriations; so that in any event it appears that whatever is ultimately realized out of this suit goes to the credit of the United States and does not constitute or give to the plaintiff double compensation for the damages sustained for loss of time.

It has been held by this court in *Gatzweiler v. Milwaukee E. R. & L. Co.* 136 Wis. 34, 116 N. W. 633, that the amount received by an injured party under an accident policy for which he has paid the premiums cannot be considered by way of partial or total satisfaction of damages claimed by such injured person from a tortfeasor.

In *Harding v. Townshend,* 43 Vt. 536, 5 Am. Rep. 304, which was an action for an injury caused by a defect in a highway, defendant claimed to have the amount received by plaintiff on an accident insurance policy deducted from the recovery, but the court said:

"There is no technical ground which necessarily leads to the conclusion that the money received by the plaintiff of the accident insurance company should operate as a defense, or inure to the benefit of the defendant. The insurer and the defendant are not joint tortfeasors or joint debtors, so as to make a payment or satisfaction by the former operate to the benefit of the latter. Nor is there any legal privity between the defendant and the insurer, so as to give the former a right to avail itself of a payment by the latter. The policy of insurance is collateral to the remedy against the defendant, and was procured solely by the plaintiff and at his expense, and to the procurement of which the defendant was in no way contributory."

In answer to the objection that plaintiff was not entitled to more than one recovery the court said: "Defendant was

not in a position to raise that question, since it was primarily liable for the injury." See, also, *Regan v. N. Y. & N. E. R. Co.* 60 Conn. 124, 22 Atl. 503; *Missouri, K. & T. R. Co. v. Rains* (Tex. Civ. App.) 40 S. W. 635; *Louisville & N. R. Co. v. Carothers,* 23 Ky. Law Rep. 1673, 65 S. W. 833; *Pittsburgh, C. & St. L. R. Co. v. Thompson,* 56 Ill. 138.

It also seems to be the prevailing doctrine in this country that where the salary of an injured person is continued by his employer during the time of his inability to perform services, such payment is no ground for diminution of the damages to be paid by the one who has caused the injury. *Williams v. St. L. & S. F. R. Co.* 123 Mo. 573, 27 S. W. 387; *Ohio & M. R. W. Co. v. Dickerson,* 59 Ind. 317; *Elmer v. Fessenden,* 154 Mass. 427, 28 N. E. 299; *Missouri Pac. R. Co. v. Jarrard,* 65 Tex. 560.

New York and Alabama courts seem to hold the contrary view.

From the foregoing statutes we hold that the lower court, in reducing the amount of the plaintiff's damages for loss of earnings since March 8, 1920, in the sum of $1,500, committed error, and that the judgment should be for the full amount of the damages as found by the jury, namely, $3,250.

The judgment of the lower court is therefore modified accordingly, and, as so modified, affirmed.

By the Court.—It is so ordered.

STATE EX REL. JARMAN, Appellant, vs. ROOT and others, Town Supervisors, Respondents.

September 22—October 18, 1921.

Highways: Laying out: Width: Presumptions.

1. Evidence showing, among other things, that a highway was laid out in 1862 four rods wide along a section line, but that the two rods west of the section line had never been used as

a highway or damages awarded to the owners on that side, who had continued to use the land to such line, along which a fence had been maintained to the present time, and that the two rods on the east side had been continuously used as a road, is *held* to warrant a finding of the trial court that the highway did not legally extend beyond the west fence.

2. To constitute a lawfully laid out highway there must be proof, or a presumption, that damages have been awarded, or a release obtained, or a dedication made.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

Action of *mandamus* to compel the supervisors of the town of Brooklyn, Green county, to remove or to take action to remove a fence alleged to be an encroachment upon a highway used by relator.

The court found as facts that the highway in question, running south from the center of section 21, was laid out in 1862 four rods wide; that only the east two rods were ever opened up or traveled; that a fence in substantially the same place it now occupies has been maintained north and south on or near the quarter line of the section, preventing travel on the west two rods of the road as described in the order laying out the highway, and that there is no record of any damages to the owners of land lying west of the quarter line of section 21, and such owners have continuously claimed and exercised the right to use as farm land the west two rods of the highway as laid out, and have maintained a fence on the east side of said two-rod strip since the road was laid out.

The court found as conclusions of law:

"1. That the highway mentioned in the relator's petition has no legal existence westerly of the fence now existing and standing substantially on the north and south quarter line of said section twenty-one (21) and for a distance of eighty (80) rods south from the center of said section.

"2. That the supervisors of the said town of Brooklyn properly exercised their discretionary power in refusing to proceed to enforce the removal of the fence complained of in the relator's petition, in view of the attitude of the owner

of said fence and of the land immediately to the west thereof, and in view of the fact that such action would involve them in uncertain litigation at best.

"3. That the defendants are entitled to judgment denying the peremptory writ of *mandamus* dismissing this action and for their costs and disbursements against the relator."

From a judgment entered accordingly the relator appealed.

For the appellant there was a brief by *H. N. B. Caradine* and *Mahlon H. Caradine,* attorneys, and *John L. Sherron,* of counsel, all of Monroe; and the cause was argued orally by *H. N. B. Caradine* and *Mahlon H. Caradine.*

For the respondents there was a brief by *W. H. McGrath* of Monroe, and *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville, and oral argument by *Mr. M. C. Mouat* and *Mr. McGrath.*

VINJE, J. It is not clear from the amended petition whether the action is one to compel the supervisors to remove the fence as an encroachment or one to compel them to institute proceedings under sec. 1330 *et seq.,* Stats. 1919, for its removal. We shall construe it, however, to be the latter.

The trial court found there is no record of an award of damages to the owners of the west two-rod strip of the highway as laid out, though there is evidence that other owners were awarded damages. Such a state of the record, in connection with the facts shown by the evidence to the effect that there is no proof that the west two-rod strip was ever opened up as a part of the highway; that there is no proof that the fence had ever occupied a substantially different place than the one it is shown to have occupied since 1865, namely, on or near the north-and-south quarter line of the section, and that the owners have continuously since said date used the two-rod strip as a part of their farm and have claimed the right so to do, rebuts any presumption that

might arise from the lapse of time that damages had in fact been awarded or a release obtained. The witness W. R. Patterson, sixty-nine years of age, testified in 1920 that his memory of the road and fence extended back fifty-five years, and that the fence on the west was an old fence when he first knew it in 1865; that it had brush and shrubs of considerable size growing close up to it like old rail fences usually have. The trial court therefore was justified in finding that the two-rod strip had never been opened up as a highway and that no damages had been awarded to the owners of such strip or a release or dedication made. We thus have this situation: No proof of the two-rod strip ever having been opened up as a highway or that damages to its owners were awarded, but positive proof that for the last fifty years there has been a fence on the west side of the strip and that such strip for that length of time at least has been used as farm land under a claim of right by its owners to so use it. From such facts no other conclusion can legitimately be reached than that the two-rod strip never was and is not now a part of the highway and that the fence sought to be removed is not an encroachment upon the existing highway. To constitute a lawfully laid out highway there must be proof, or a presumption, that damages have been awarded or a release obtained or a dedication made. *Dolphin v. Pedley,* 27 Wis. 469; *McKee v. Hull,* 69 Wis. 657, 35 N. W. 49. Here we have no proof of an award of damages, and the facts as to user of the two-rod strip and location of the west fence rebut the presumption of an award or release or dedication.

By the Court.—Judgment affirmed.

KRESSINE, by guardian *ad litem*, Respondent, vs. JANESVILLE TRACTION COMPANY, Appellant.

September 22—October 18, 1921.

Negligence: Objects alluring to children: Standing street car: Precautions to prevent injury to children: Reasonable anticipation of childish conduct.

1. One may not maintain in a public street an implement, machine, or structure attractive to children without taking due care to prevent injury resulting to them by reason of natural childish interference therewith.
2. A street railway company which left a street car standing on its track in a public street is chargeable with knowledge that it is an alluring object to children, and is therefore required to render it innocuous to probable childish incursion.
3. The railway company having tied the trolley pole to the top of the standing car, turned the switches at both ends of the car, set the brakes, removed the controller, and locked the doors, as a matter of law took proper precaution to prevent children from moving the car and thus injuring themselves.
4. The railway company was charged with knowledge of the ordinary conduct of children and was bound to anticipate consequences arising from such conduct; but it was not bound to anticipate the extraordinary conduct or precocious ingenuity of a group of boys in crawling on top of the car, placing the trolley pole in contact with the wire, and then picking up an insulator, never used for the purpose, and making it serve as a controller to start the car.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries sustained by plaintiff on June 13, 1919, a boy then about three years of age. The evidence shows that on or before June 13, 1919, a repair crew in the employ of defendant had been habitually conveyed to the then terminus of the Jackson-street line in the city of Janesville in an old street car. The workmen were let out of the car at the scene of their work, and the foreman then took the car to the end of the line on South Jackson street, which was the only place the car could be left without interfering with regular city

service. The testimony shows that the foreman upon leaving the car habitually pulled the trolley pole down away from the trolley wire and tied it down to the top of the street car, it being necessary for him to climb to the top of the street car to do so. He then threw out the overhead switch, which is a cut-out or switch located on the ceiling of the street car, and as high as a man can reach, which broke the connection so that the car could not be started unless the switch was put in again. He also set the brake on the car, removed both of the controller levers, the forward and reverse controls of the car, and took them away with him to the place where the repair gang was working, so that nothing but the square projections on which they fit was left. Finally he closed both of the doors of the street car. These doors had no locks, but did have a catch or lever on the inside, so that when shut it was necessary to get in through a window in order to open them again. It appeared, however, that one of the doors of the car stuck at times and that it was not always possible to get it entirely shut.

Children were in the habit of congregating in the street in the vicinity of this work car. They frequently got into the car through the windows or doors, in some manner not clearly appearing, and frequently played in and about the car. The employees of the defendant company knew of this fact and frequently chased them away. On one or two occasions prior to the day of the accident the children did put up the trolley pole, threw in the overhead switch, and by some means not described had managed to start the work car. One witness testified that on one occasion they operated it in that manner a distance of about half a block and back again. It does not appear that any employee of the defendant knew that the work car was ever moved by the boys or that they had ever touched the trolley pole or overhead switch; neither is there any evidence that the boys ever left the trolley pole up, or the overhead switch turned on, when they departed on any occasion previous to the accident.

On the day of the accident the witness Charles Knoff, a

motorman employed by the defendant and in charge of a car in city service on the South Jackson street line, ran his car to the temporary terminus of the line on South Jackson street at the scene of the accident, and stopped his car at about six or eight feet north of the work car. He turned the trolley pole around ready for the return trip and went back into the car, proceeding to the front end where he was preparing to start. While so engaged, and with his car standing still, the plaintiff and his companions who were playing in the work car at the time started it up. The plaintiff was on the front end of the work car. The work car traveled the six or eight feet intervening between the two cars without attracting the attention of the motorman on the street car, and bumped into the regular car, pushing it along. The plaintiff boy was caught between the two cars and sustained the injuries to recover damages for which this action was brought. It was necessary for the motorman on the service car to enter the work car to stop it. He found that the boys had picked up an instrument, called an insulator, which resembles very much the handle of a dumb-bell, upon the end of which is a staple-shaped opening. The boys had pressed this opening down over the controller shaft so as to enable them to start the car. This insulator had never been used for such a purpose to the knowledge of any one who testified in the case, nor had any of the witnesses ever considered it as capable of such use.

The evidence showed that one of the boys, a brother of the plaintiff, had climbed on top of the street car and released the trolley pole from its fastenings and placed it in contact with the trolley wire. There was also testimony to the effect that on several occasions when the city service cars came to the end of the line on South Jackson street previous to the accident, motormen had permitted boys to help them turn the trolley pole around and that at times conductors or motormen had given the boys a penny on such occasions.

At the close of the evidence the defendant moved the

court to direct a verdict in its favor, which motion was denied. A special verdict was returned by the jury in which it was found that the defendant was guilty of a want of ordinary care in leaving the car under the circumstances in the condition it was left on the day of the injury, which want of ordinary care was the proximate cause of the injury; that the plaintiff was not guilty of a want of ordinary care which proximately contributed to produce the injury, and that the plaintiff was not of sufficient age and discretion to care for his own safety and render it prudent to go about alone. Damages were assessed at the sum of $1,383.33. The defendant thereupon moved the court to change the answer to the first question of the special verdict from Yes to No and for judgment on the verdict as amended; for judgment upon the verdict as rendered; for judgment notwithstanding the verdict; and to set aside the verdict and for judgment for defendant. All of said motions were denied and judgment was rendered for the plaintiff. The defendant appealed from such judgment.

For the appellant there was a brief by *Nolan, Dougherty & Grubb* of Janesville, and oral argument by *W. H. Dougherty.*

For the respondent there was a brief by *Kading & Kading* of Watertown; and oral argument by *C. A. Kading.*

OWEN, J. In recognition of the fact that children will play in a public street, this court has held that one may not maintain therein an implement, machine, or structure attractive to children without taking due care to prevent injury resulting to them by reason of natural childish interferences therewith. *Busse v. Rogers,* 120 Wis. 443, 98 N. W. 219; *Harris v. Eastern Wis. R. & L. Co.* 152 Wis. 627, 140 N. W. 288; *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60; *Webster v. Corcoran Brothers Co.* 156 Wis. 576, 146 N. W. 815. The duty thus cast upon him who places or maintains such an implement, machine, or structure in

the street is founded upon considerations of humanity rather than any legal relations existing between him who maintains the dangerous apparatus and the children who may come in contact therewith. It follows naturally from a recognition of the fact that children of tender age have not acquired an appreciation of the impropriety of meddling with other people's property nor the dangers lurking in the complicated machine. The all-wise Providence has implanted in the child a curiosity which can be satisfied only by feeling and handling new and strange objects. This is a trait which frequently tries the patience of adults, but it is an instinct ordained by nature and cannot be changed by man.

In fixing a standard of human conduct involving the safety of children this trait cannot be ignored. Children are all about us wherever we go and whatever we do, especially if it be in the public street. That their presence in the public street is not only an aggravation to adults but dangerous to their safety, all will concede. But that they will be in the public streets at inopportune times and places is a fact that cannot be ignored. From these considerations this court has laid down the rule that "conservation of child life and safety, as to artificial perils, is one of such importance that ordinary care may well hold every one responsible for creating and maintaining a condition involving any such with reasonable ground for apprehending that children of tender years may probably be allured thereinto." *Webster v. Corcoran Brothers Co.* 156 Wis. 576, 146 N. W. 815; *Kelly v. Southern Wis. R. Co.* 152 Wis. 328, 140 N. W. 60.

The defendant had a lawful right to leave the street car here in question standing on the track in the street as it did. It was unquestionably chargeable with knowledge of the fact that children were continuously playing in the street, around and about the street car, and that the car was a most alluring object to the children of that neighborhood. This laid upon the defendant a duty to render its presence harmless to the ordinary childish interferences therewith in the

nature of original research and investigation. The jury found that the defendant company failed in its duty in this respect. This finding is challenged as being contrary to the evidence, and we are to determine whether the conduct of the defendant fulfilled its obligations in this respect as a matter of law.

That the probability of childish interference with the car was appreciated and a *bona fide* effort made to render it innocuous to probable childish incursion is manifest. The employees who had charge of the car testified that the following things were done to render it inanimate and irresponsive to any childish intermeddling therewith: first, the trolley pole was tied down to the top of the car; second, the switch at either end of the car was turned, thus breaking for a second time the electric current; third, the brakes were set; fourth, the controller, a crank-shaped device which regulates the flow of electric current when in the hands of the motorman, was taken away; and fifth, the doors were locked. That they did all these things there is no direct testimony to dispute. But it is contended that the testimony in this behalf was either so shaken upon cross-examination, or made improbable by other circumstances in the case, that the jury had a right to disbelieve that the doors were locked or that the switch at the end of the car had been turned. Granting this contention, it remains conceded by every witness in the case that the trolley pole was tied down to the top of the car and there is no reason whatever to doubt that the controller was taken away. It is a verity in the case, then, that the trolley pole was disconnected from the electric over-head wire and securely tied down to the top of the car and the controller taken away. Without contact by the trolley pole with the electric over-head wire the street car was an inert object. The controller was generally regarded as an indispensable instrument for the setting of the car in motion.

With these facts in mind, the question is whether, in tieing down the trolley pole and removing the controller, the

company was in the exercise of due care for the safety of children who might be playing thereabouts. The care required under such circumstances is reasonable care. It is the care that men of ordinary prudence would exercise under the same or similar circumstances. The dangers which it was the duty of the company to guard against were such as reasonably might have been anticipated. It was not an insurer of the safety of the children. It was not the duty of the company, as we view it, to so dismantle or disempower the car as to render it harmless under every conceivable circumstance. It was charged with knowledge of ordinary childish conduct, and it was bound to anticipate consequences resulting from such conduct. It was not bound to anticipate consequences resulting from the unusual or extraordinary conduct or the precocious ingenuity displayed by this particular crowd of boys.

In considering a similar situation the Minnesota court said:

"We do not mean to intimate, in respect to the matter of fastenings in a case like this, that they must be such as to render it impossible for children to remove them, nor that the fact that in the particular case they were removed by such children necessarily makes a case of negligence. But they ought to be such (we are speaking of cases where very young children, to the knowledge of the defendant, have ready access to, and may be attracted by, turntables and carwheels standing on the tracks) that an ordinarily prudent person would deem them sufficient to render it improbable that children, within the rule, would remove them." *O'Malley v. St. P., M. & M. R. Co.* 43 Minn. 289, 45 N. W. 440.

We think this language quite clearly and correctly states the degree of care required under the circumstances here, and it seems to us that the conduct of the defendant responded fully to that standard. In the first place, it should hardly be required to anticipate that boys of eight or nine years of age would crawl on top of the street car and untie the trolley pole so that it might be placed in contact with the

electric wire; but even should it be held to such an anticipation, certainly it could not be held to anticipate that these boys would seize upon an implement never used for that purpose and make it serve as a controller. To hold the defendant responsible for the plaintiff's damage is to require it to be an insurer of the safety of children in and about its cars under all circumstances, and would well-nigh lay upon it the duty of placing a guard at a car when left standing on a street. We do not think the defendant's negligence was a jury question. Its conduct responded to the degree of care required by it under the circumstances. It follows that the judgment should be reversed, and the cause remanded with instructions to dismiss plaintiff's complaint.

By the Court.—So ordered.

HOGAN, Respondent, vs. CITY OF BELOIT, Appellant.

September 23—October 18, 1921.

Municipal corporations: Notice of injury on defective street: Sufficiency: Amendment: Necessity: City repairing street: Defective condition: Pleading: Effect of demurrer: Conclusions in complaint.

1. A right of action against a municipal corporation for injuries from a defect in a city street being purely statutory, the conditions imposed thereby are precedent to a right of action, and failure to give the notice of the injury required by the statute is fatal.
2. Where a complaint against a city set forth *in hæc verba* the notice which was given, allegations as to its nature and contents would be inadmissible, and any conclusion of law or construction placed upon the notice is not admitted by a demurrer.
3. A notice to a city that plaintiff, on a stated date and on a designated street, caught her foot on an obstruction and fell, breaking her wrist, that a doctor had set it, and "will advise you later as to expense," signed by plaintiff's son, did not state "that satisfaction therefor is claimed of such city," as required by sec. 1339, Stats., and was insufficient.

4. A notice which did not state the facts required by sec. 1339 could not be regarded as sufficient on the ground that such notice was given as would enable the city by investigation to discover all the facts.
5. Failure of the notice to state that satisfaction for the injury was claimed from the city was not an inaccuracy as to time, place, insufficiency, or want of repairs to be disregarded under the proviso of sec. 1339 relating to notice.
6. There was no waiver by or estoppel of the city as to the sufficiency of the notice because the claim was drawn by the city engineer at the instance of claimant's son, the act of the engineer not being in performance of any duty owing to the city.
7. Such notice is not a pleading or proceeding in an action within sec. 2829, Stats., authorizing disregard of error therein not affecting substantial rights, the notice being a condition precedent to the action.
8. A city in repairing a street acts in a governmental capacity, and there is no common-law liability for negligence, as in case of active independent negligence or trespass, which might dispense with the notice of claim for injuries from negligent conduct in making the repairs required by sec. 1339.

Appeal from an order of the circuit court for Rock county: George Grimm, Circuit Judge. *Reversed.*

The appeal is from an order overruling a demurrer to the complaint.

R. A. Edgar of Beloit, for the appellant.

For the respondent there was a brief by *Michael Levin* and *Julius E. Kiefer,* attorneys, both of Milwaukee, and *H. W. Adams* of Beloit, of counsel, and a separate brief by *Michael Levin,* attorney, and *H. W. Adams,* of counsel; and the cause was argued orally by *Mr. Levin.*

Jones, J. The complaint alleges that the plaintiff, on or about the night of October 18, 1919, while walking along the sidewalk of a well-traveled street, stumbled and fell over a barrier several inches high which the defendant, city of *Beloit,* had placed there to protect some freshly-laid concrete, and the presence of which had not been shown by lanterns or other guards. The amount of damages claimed was

$10,000. The other parts of the complaint which raise the questions necessary for consideration are as follows:

"That on the 21st day of October, 1919, and within fifteen (15) days after the happening of said injury above alleged, plaintiff caused to be given and served upon the defendant, through its city engineer, who is also chairman of the board of public works, in charge of said street and sidewalk and work, and also by causing the same to be given to each member of the council and the mayor, and having the same delivered to the city clerk on said date, and read by the said city clerk in the presence of each alderman and the mayor, a notice, in writing, stating therein the place where such damage occurred, substantially as above alleged, and describing, generally, the insufficiency and want of repair which occasioned the injury above alleged, the injury received by the plaintiff, and that satisfaction therefor was claimed by her, a copy of which notice is hereto attached, marked 'Exhibit A,' and made a part of this complaint; that said notice was drawn up at the instance and request of plaintiff by the said city engineer of the city on said date, to whom was given all the facts in detail with reference to said injury, and said notice was drawn by him, and that said city engineer informed the plaintiff, through her agents, that said notice would be sufficient, and at once caused the same to be delivered to the proper city officials, who had the same read at the council meeting on said night."

The notice annexed to the complaint was as follows:

"*Mrs. Nellie Hogan,* aged 60, 227½ E. Middle, on Sat. Oct. 18, 1919, walking on west side of Fourth at Merrill, caught her foot on a 2-inch plank laid across walk and fell, breaking bone in left wrist. Dr. Anderson set bone. Will advise you later as to expense. OLAF HOGAN,
"227½ E. Middle."

Olaf Hogan was the son of the plaintiff and the writing was drawn at his request by the city engineer, who caused it to be delivered to the mayor.

The defendant demurred and in support of the demurrer argued that the notice was not within sec. 1339, Stats., which

provides, in part, that the notice shall be "signed by the party, his agent or attorney," and that it shall state "that satisfaction therefor is claimed of such . . . city."

Counsel for the plaintiff contends that there has been a substantial compliance with the purpose of the statute. He also claims that irrespective of the statute he has a cause of action, since the city undertook the repair of the sidewalk and negligently left an obstruction, and as a result of such negligence the plaintiff sustained the injury alleged.

At common law travelers had no cause of action for injuries caused by insufficiency or want of repair of highways. The right to maintain such actions is purely statutory. In granting the right the legislature may impose such conditions as it may see fit, and a substantial compliance with those conditions is a condition precedent to recovery.

This is a rule often declared by this court, from which the other rule follows that if the complaint fails to state such compliance it is demurrable. Since one of the conditions imposed by the statute conferring the right is that a written notice be given, the failure to allege such notice is a fatal defect. *McKeague v. Green Bay,* 106 Wis. 577, 82 N. W. 708; *Benware v. Pine Valley,* 53 Wis. 527, 10 N. W. 695; *Wentworth v. Summit,* 60 Wis. 281, 19 N. W. 97; *Daniels v. Racine,* 98 Wis. 649, 74 N. W. 553.

In this instance the notice of the injury is set forth *in hæc verba,* and allegations in the complaint describing its contents or nature would be immaterial.

"A demurrer does not confess or admit a conclusion of law deduced by either party from the facts pleaded; neither does it admit any construction placed by him on any instrument pleaded and set forth in the complaint, or facts impossible in law." 21 Ruling Case Law, p. 508.

One important condition imposed by the statute is that the notice must show that satisfaction for the injury is claimed of the municipality. Numerous decisions of this

court have held the obvious rule that this is an essential requirement of the statute.

One of the questions presented is whether the written notice given in this case satisfies this clause of the statute. Plainly there is no express statement that satisfaction will be claimed by *Nellie Hogan* or any one else. Information is given of the time and place of an accident, of an injury and attendance by a physician, Dr. Anderson, and the statement is added, "Will advise you later as to expense." The notice is addressed to no one. It is not signed by the person injured or by any one described as her agent or attorney. It is true that the city authorities might have indulged in speculation or drawn the inference that Olaf Hogan was the agent of *Mrs. Hogan* and that she intended to file a claim against the city, but there is certainly no claim for satisfaction for the injury. Construed most favorably for the plaintiff, it is only a notice that a specified injury had happened to her in the city on a sidewalk which was defective; that she had had medical attendance; and that she would in the future give information as to expense. While this informed the city officials of the accident and injury, it fell far short of notice that *Nellie Hogan* intended to bring suit against the city for $10,000, or any other amount, unless compensated.

There is a very material difference between a casual notice in writing that an injury has been sustained by reason of a defective street and that expense has been incurred or will be incurred and a notice which makes a claim that satisfaction is demanded. In the former case the vital part of the statutory requirement is omitted. In the latter case the officials of the city are put upon notice not only that there is a defective street but that a claim is asserted which may result in heavy loss to the city.

It is argued by counsel for plaintiff that such notice was given to the city that its officers could by investigation have

ascertained all the facts. But it is not the only purpose of the statute to bring notice to the municipality that an injury has happened on a defective highway at a given time and place. This was illustrated in the case of *McKeague v. Green Bay,* 106 Wis. 577, 82 N. W. 708. In that case a formal notice in due form was given by a wife. The action for the injury was brought by her husband, and it was held that the notice did not satisfy the statute because not given by the plaintiff himself, claiming satisfaction for the injury.

Other cases holding that there must be a substantial compliance with the statute are *Weber v. Greenfield,* 74 Wis. 234, 42 N. W. 101; *Sowle v. Tomah,* 81 Wis. 349, 51 N. W. 571; *Daniels v. Racine,* 98 Wis. 649, 74 N. W. 553; *Benson v. Madison,* 101 Wis. 312, 77 N. W. 161.

It is argued by counsel for plaintiff that they are aided by the provision in the statute that "No notice given hereunder shall be deemed insufficient or invalid solely because of any inaccuracy or failure therein in stating the time, describing the place or the insufficiency or want of repairs which caused the damage for which satisfaction is claimed, provided it shall appear that there was no intention on the part of the person giving such notice to mislead the other party and that such party was not in fact misled thereby;" but it will be observed that the defect in the notice does not relate to the time, place, or insufficiency or want of repairs. This provision in no way relieves the claimant from stating that satisfaction for the injury is claimed. As stated in *Uhlenberg v. Milwaukee G. L. Co.* 138 Wis. 148, 151, 119 N. W. 810:

"The fact that the statute has provided that certain requirements thereof are not essential to the validity of the notice, where no one is misled and there was no intent to mislead, would indicate that its other provisions must be substantially complied with."

Apart from this provision in the statute it seems to have been the legislative policy not to extend the privilege of

bringing actions under sec. 1339. In the Revised Statutes of 1849 and 1858 the right of action was not conditioned on notice. In the Revised Statutes of 1878 this was made a condition precedent. Since that time the ninety-day notice to cities has been cut down to fifteen days. It would of course be competent for the legislature to remove or change the condition imposed by the statute; but so long as the statute remains in force we do not deem it our duty to so construe it that its most essential requirements may be ignored. To give the statute the construction contended for by plaintiff's counsel would make almost any notice or memorandum suffice provided it could be shown by parol that the municipality had knowledge of the facts and had not been misled. This would be contrary to the rule which has long prevailed in this court. *Sowle v. Tomah,* 81 Wis. 349, 51 N. W. 571. We are convinced that for the reasons already stated the complaint was fatally defective.

It is urged by counsel for the defendant that the notice was also defective for the reason that it did not purport on its face to be signed by the plaintiff, her agent or attorney. In view of the conclusion we have reached it is not necessary to decide this question.

It is argued by plaintiff's counsel that the allegations of the complaint show a waiver and estoppel by defendant. It is plain that in preparing the notice the city engineer was acting on the request of the son of the plaintiff, and not as agent of the defendant. He was charged with no duty as city engineer or as chairman of the board of public works in respect to filing or considering claims of this character, and plainly had no authority by any such act or statement to waive the condition prescribed by the statute. Although it appears from the complaint that the notice was read in the presence of the mayor and aldermen it does not appear that any further action was taken in respect to it.

The notice simply brought to their attention the facts therein stated. Since it was not such notice as the statute

requires, their knowledge of the facts did not avail the plaintiff as a waiver of the condition precedent. *Sowle v. Tomah, supra; Dorsey v. Racine,* 60 Wis. 292, 18 N. W. 928.

With commendable industry counsel for both sides have cited many cases decided by this court and other courts bearing on the questions of waiver and estoppel. Many of the cases arose between individuals or between private corporations. In such cases the rules applicable may be quite different from those which govern when the acts of officers of municipal corporations are considered. Such officers are creatures of the law and their powers are strictly limited.

It suffices to say that in our opinion no action was taken by defendant which misled the plaintiff, and that there are no facts alleged in the complaint which show a waiver or which estop defendant from relying on the condition precedent created by the statute. Whether the city could waive the condition or be estopped by its acts from relying on it, need not be decided.

Plaintiff's counsel cite sec. 2829, Stats., which provides, "The court shall, at every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect," and claim that even if the notice was defective the court may disregard the defect. It seems a sufficient answer to this argument that the notice required by sec. 1339 is not a pleading or proceeding in an action within the meaning of sec. 2829. On the contrary, it is a condition precedent to the commencement of an action, and unless it is complied with, if the objection is properly raised, the action cannot be maintained.

The further claim is made by plaintiff's counsel that under the facts stated in the complaint, no notice whatever to the city was required, because the city itself by its negligence

created a condition which caused the injury, and that such active negligence was actionable independent of sec. 1339.

Counsel rely upon *Smith v. Milwaukee,* 18 Wis. 63, and *Milwaukee v. Davis,* 6 Wis. 377, and especially upon *Hughes v. Fond du Lac,* 73 Wis. 380, 41 N. W. 407. In the latter case it appeared that the plaintiff's horse became frightened at a large wooden roller in the street, whereby the injury to the plaintiff was caused. The case of *Little v. Madison,* 42 Wis. 643, where the city licensed a street exhibition of a bear, is also cited. Another case relied on is *Pettigrew v. Evansville,* 25 Wis. 223, where a municipality diverted water from a pond and discharged it upon the land of the plaintiff. The general subject is quite fully discussed in a later case, *Bunker v. Hudson,* 122 Wis. 43, 99 N. W. 448, where the city so graded a street that earth was washed over the plaintiff's land.

These cases are easily distinguished from the one before us. They were for the most part cases where the municipality created a nuisance in the street or where an injury in the nature of trespass was caused. They are not cases in which the city, in the performance of a governmental duty to travelers, was performing a lawful act but in a negligent or improper manner. The true distinction is well pointed out in *Ziegler v. West Bend,* 102 Wis. 17, 78 N. W. 164. In that case the complaint alleged that the plaintiff was injured by falling into the manhole of a catch-basin, the cover of which was so improperly adjusted as to be dangerous. Other cases bearing on the question under discussion are *Evans v. Sheboygan,* 153 Wis. 287, 141 N. W. 265, and *Morrison v. Eau Claire,* 115 Wis. 538, 92 N. W. 280.

It seems clear to us that in repairing the walk by putting in the two squares of concrete the city was acting in a governmental capacity and that no common-law liability is shown by the complaint.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to sustain the demurrer.

MARTIN, Respondent, vs. ARMSTRONG, Appellant.

September 23—October 18, 1921.

Sales: Pure-bred cattle: Failure to furnish registration certificates: Instructions: Measure of damages: Duty to minimize loss.

1. In an action against the seller of cattle for damages for failure to furnish certificates of their registration and transfer, where the jury found that defendant had agreed to furnish them, it was proper to instruct the jury that it was incumbent on the defendant to perform within a reasonable time.
2. As respects the liability of the seller for breach of contract by failing to furnish the registration and transfer certificates within a reasonable time, the fact that the registering association required from thirty days to two years to issue such papers will not relieve the seller, where he took no active steps to secure the papers within a reasonable time.
3. Since the evidence showed that the pedigree and ownership of cattle is a material element in establishing market value, the measure of plaintiff's damages would be the difference in market value with and without the proper registration and transfer papers.
4. A requested instruction in such case as to the duty of plaintiff to minimize the damages by securing the registration and transfer papers himself is *held* not to be warranted by the evidence.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action was brought in the circuit court for Jefferson county and removed to the circuit court for Rock county to recover damages for the alleged failure of the defendant to furnish certificates of registration and transfer of four heifers sold by the defendant to the plaintiff on May 23, 1919.

The plaintiff contends that the defendant agreed to furnish with the four head of pure-bred registered cattle, at the time of delivery or within a reasonable time thereafter, proper and authentic registration and transfer papers; that the cattle were delivered and the plaintiff immediately paid to the defendant the price agreed upon; that on November

26, 1919, defendant furnished the plaintiff with one registration paper, and on August 15, 1920, furnished the plaintiff with the balance of the registration papers, but neglected and refused to deliver transfer papers for the four head of pure-bred registered cattle with proper breeding certificates, which are required by the Holstein-Friesian Association of America for the registration of the offspring of such cattle, and wholly failed and neglected to cause the registration certificates to be transferred of record to the plaintiff as agreed at the time of the sale of the cattle. Plaintiff further claims that the four cattle were represented to be young and exceptionally well bred and that he purchased them for the special purpose of reselling them as pure-bred registered Holstein dairy cattle; that if they had been of the kind and quality represented and if the proper certificates of registration had been furnished as required by the rules of the National Holstein-Friesian Association, the four cattle were of the then actual cash value of not less than $250 each, or a total of $1,000; that without the proper certificates they were of the value of only $100 each, and that he thereby was damaged to the extent of $600. The plaintiff further claims that he shipped the four head of cattle to Hutchinson, Kansas, and kept them on a place where he had a herd of cattle, partly pure bred and partly grades; that he had no means of identifying the cattle without the certificates of registration, which in the case of Holstein cattle bear a diagram showing the black and white markings of such cattle; that on August 28, 1919, plaintiff offered the said cattle at public auction and warranted the delivery of the certificates and transfers; that not being able to produce the certificates and transfers at the time of sale he only received one half of their actual value for the cattle; that before the date of the sale he had written and telegraphed to the defendant for the papers, which defendant neglected to produce and also neglected to answer the plaintiff's letters; that afterwards the purchasers at the said sale refused to pay for the same

because plaintiff could not furnish the papers and returned the same to plaintiff's premises; that plaintiff could not keep the cattle separate without great expense and was obliged to sell two of said cattle which were returned to him as grade cattle at $75 per head; that the remaining two head are now being held by the purchasers thereof at plaintiff's expense, and plaintiff is obligated and will be obliged to return to the purchasers the money which they have paid therefor and the expense of their keep for a year and a half and take said cattle back.

Defendant answers that on November 26, 1919, he furnished the plaintiff with a registration certificate for one of the cattle, and on August 15, 1920, with registration certificates for the other three; that the four head of cattle were represented to be pure-bred cattle of registered Holstein breed, as in fact they were; that plaintiff informed defendant at the time of sale that he intended to ship the cattle to his place at Hutchinson, Kansas, where he intended to keep them for breeding purposes entirely separate from the grade cattle he also had, and that in order to identify the four head of cattle he caused the same to be permanently marked; that, although under no obligation to do so, defendant made every reasonable effort to secure the registration and transfer papers from and through the former owner of the cattle from whom the defendant had purchased the same and also through the Holstein-Friesian Association of America.

The case was tried before the court and a jury. Verdict was rendered in plaintiff's favor in the sum of $237.50 and judgment was entered thereon. Appeal is taken from this judgment.

The cause was submitted for the appellant on the brief of *Charles E. Pierce* of Janesville, and for the respondent on that of *Mistele & Smith* of Jefferson.

Siebecker, C. J. It is contended that the circuit court misdirected the jury in the following particulars: (1) In

directing the jury that if they found upon the evidence adduced that the defendant at the time of the sale of the cattle agreed to furnish plaintiff properly authenticated registration and transfer papers of the breeding records as kept by the Holstein-Friesian Association of America of the four cattle in question, the defendant was required to furnish such papers within a reasonable length of time after such sale under all of the facts and circumstances of the transaction; and in omitting to instruct the jury that under certain specific circumstances such papers could only be furnished by defendant with plaintiff's assistance; (2) that the court erroneously instructed the jury that the measure of damages was the difference in market value of the four pure-bred cattle with such registration and transfer papers and the market value without such papers; and (3) that the court erroneously omitted to instruct the jury that it was incumbent on plaintiff to minimize the alleged damages by such reasonable means as were within his power, and that upon the evidence in the case plaintiff could have reasonably obtained these registration and transfer papers at a nominal expense, and hence his recovery of any damages could not exceed the amount of such expenditures.

It is evident from the record that the issue whether or not the agreement respecting the furnishing by defendant of the registration and transfer papers for the four pure-bred cattle was entered into by the parties at the time defendant sold plaintiff the cattle was properly presented for trial. The evidence on the subject is in conflict and required determination of this question by the jury. Upon this issue the jury resolved the controversy in plaintiff's favor. Under this state of the case, did the court properly direct the jury that the defendant, in order to comply with his agreement to furnish these papers, was required to do so within a reasonable time after such sale? Since the jury resolved this issue in plaintiff's favor, it follows that it was incumbent on defendant to perform the contract within a reasonable time there-

after, in the light of the facts and circumstances of the transaction. It is claimed by defendant that the evidence shows without dispute that defendant was prevented from furnishing these papers because the Holstein-Friesian Association in the usual course of its business required from thirty days to two years to issue such papers. An examination of the evidence shows, however, that the jury was warranted in concluding that the defendant took no active steps to secure such papers until after the plaintiff had held a sale on August 28, 1919. Evidently the jury found that the defendant was apprised of the fact that plaintiff contemplated holding this sale when the cattle were bought. Under these circumstances it is plain that defendant did not live up to this agreement and that the court properly submitted this issue to the jury. The court applied the correct rule of law to this issue, and the jury was not misled by the instruction.

It is urged that the court erroneously instructed the jury that, if plaintiff is entitled to recover, his damages were to be measured by the difference in the market value of these pure-bred cattle with the proper registration and transfer papers having been furnished and the market value without such papers. There is evidence tending to show that the want of such papers is a factor in the market value of such cattle. Evidently the existence of a complete record showing the pedigree and ownership of such cattle is a very material element in establishing their market value. Under this condition we are persuaded that the court submitted the correct rule of damages to the jury. But it is argued that the instructions on this question wholly omit to inform the jury that it was plaintiff's duty to do all he reasonably could to minimize the amount of the damages and that the evidence shows that plaintiff could readily have secured these registration and transfer papers at a cost not to exceed $15; that he made no effort in this respect, and his damages should have been limited accordingly. This claim is not sustained by the evidence. The records of the Holstein-Friesian Asso-

ciation showed that the cattle in question were owned by one C. E. Brenner of Williamsport, Indiana, who had sold them to defendant. But there was no record of this transfer with the association. The claim that plaintiff could have procured such transfer papers under the by-laws of the association (art. 4, sec. 42) is not correct. As stated in the letter of June 21, 1921, of the association to the plaintiff:

"In order to do this, however, it is necessary that we have from *Mr. Armstrong* proof of full payment of the animals in the form of a canceled check, or sworn statement, and as proof of delivery we must have from you diagrams of the colors and markings of the animals drawn from life."

As heretofore indicated, the jury found the defendant agreed to furnish these papers within a reasonable time after May 23, 1919, the date the plaintiff bought the cattle. It appears that defendant as late as January 21, 1921, had not complied with the requirements of the association to make a record of the transfer from Brenner to himself. Manifestly the jury was abundantly justified in finding that defendant had not complied with the agreement and that he had breached the contract of sale.

It necessarily follows that he was liable in damages for such default. It is considered that the circuit court committed no error in submitting the issues to the jury; that the verdict is sustained by the evidence; and that the court properly awarded judgment in plaintiff's favor.

By the Court.—The judgment appealed from is affirmed.

OHRMUNDT, Respondent, vs. SPIEGELHOFF, Appellant.

September 23—October 18, 1921.

Fraud: False representations: Good faith: Reliance: Diligence: Evidence: Value of property exchanged: Trial: View of premises: Measure of damages: Form of special verdict.

1. In an action for false representations inducing an exchange of plaintiff's farm for defendant's plat of ground and dwelling house, evidence as to the value of plaintiff's farm was admissible on the question as to whether plaintiff relied on the representations.
2. Where defendant, in inducing the exchange, told plaintiff there were four and one-half acres in the plat and that the second fence from a certain point, and not the first fence, was the boundary of the property, whereas the tract contained about two and one-half acres and the first fence was the boundary, the representations were such as to authorize the plaintiff to rely thereon.
3. There having been no opportunity for adequate examination by plaintiff as to the quality of the soil, he having visited the premises only once before the trade was made, on an occasion when there was snow, ice, and water on the ground, he might rely on the representations of the owner as to the quality of the soil.
4. A view is had to enable the jury to understand and correctly weigh the evidence, and if it is conflicting the view may be used to aid them in determining whose evidence is the more credible; and where the evidence as to the value of the property was conflicting it was not error for the court to grant a view over objection.
5. The measure of damages for false representations as to the quantity and quality of the land exchanged is the difference between the value of the property as it actually was at the time of the exchange and as it would have been had it been as represented.
6. An instruction that "as to material misrepresentations relied on by the purchaser, he having no knowledge or means of knowledge on the subject, the question whether, in the exercise of ordinary care and prudence as an intelligent man, he ought or ought not to have relied thereon, is immaterial," was not subject to exception when taken in connection with the preceding charge that, if false representations were made as to the value of the property and its quality as to productiveness,

plaintiff could not recover damages for such misrepresentations, if in the exercise of ordinary care and prudence he ought not to have relied thereon.

7. Where material false representations have been established the question is, Was plaintiff actually misled by them? and not, Would an ordinarily careful and prudent man be misled by them?

8. If false representations were made and relied on by plaintiff, to his injury, it is immaterial that the person making the same in good faith believed them to be true.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action to recover damages sustained by the plaintiff by reason of false representations made by the defendant, among others as to the quantity of land and quality of soil of a plat of ground and dwelling house in Watertown traded by him for plaintiff's farm. The jury by a general verdict found for the plaintiff and assessed his damages at $2,400, and the defendant appealed.

For the appellant there was a brief by *Skinner & Thauer* of Watertown and *Charles B. Rogers* of Fort Atkinson, and oral argument by *Mr. Rogers* and *Mr. Nicholas Thauer.*

Otto Kuenzli of Watertown, for the respondent.

VINJE, J. This is the third trial of the case. The first trial in Jefferson county resulted in a verdict of $500 for plaintiff. Upon defendant's motion the verdict was set aside and a new trial granted and a change of venue had to Dodge county. On the second trial the jury failed to agree.

A number of false representations in addition to those mentioned were alleged in the complaint and testified to, but the two mentioned are the most material ones, and if sustained by the evidence would warrant the verdict rendered and require an affirmance of the judgment unless prejudicial error in the trial requires its reversal.

Some evidence was received as to the value of the farm traded for the Watertown house and ground, but after a

colloquy between court and counsel it was stricken out. Defendant claims it was not all stricken out and that other evidence as to the value of the farm came in over his objection, and a number of assignments of error on this ground are argued. The evidence was admissible and should not have been stricken out. It appears that plaintiff's equity in the farm was worth between $4,000 and $5,000. It was incumbent upon him to establish not only that false representations had been made to him, but that he relied upon them in making the trade. If he can show that he parted with a consideration equal to the value of the premises received in trade as represented by the defendant, it is pretty persuasive proof that he relied upon the representations. Thus, if land is worth $100 per acre and A. claims B. pointed out a tract that contained three acres, but B. claims he pointed out only a two-acre tract, the fact that A. paid him $300 is strong evidence that he relied upon B.'s representations as to quantity. If the proof showed he paid only $200, the jury might well say that no reliance was placed upon the representations that there were three acres or that such representations were never in fact made. Since such proof was admissible in evidence, all assignments of error predicated upon its wrongful retention or admission fall.

Plaintiff testified that defendant told him there were four and one-half acres in the city tract; that looking from the barn the second fence therefrom and not the first fence, through which there was a gate, was the boundary of the property, whereas in fact the tract contained only about two and one-half acres and the first fence was the boundary. Defendant denies this testimony, but there is nothing in the evidence from which we can say the jury erred in finding for the plaintiff, so the finding must stand. That the representations made as to quantity of land were of such a character and made under such circumstances as to authorize the purchaser in relying upon them is established by abundant

authority in this state. *Bird v. Kleiner,* 41 Wis. 134; *Tyner v. Cotter,* 67 Wis. 482, 30 N. W. 782; *Davis v. Nuzum,* 72 Wis. 439, 40 N. W. 497; *Middleton v. Jerdee,* 73 Wis. 39, 40 N. W. 629; *Castenholz v. Heller,* 82 Wis. 30, 51 N. W. 432; *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88; *Porter v. Beattie,* 88 Wis. 22, 59 N. W. 499; *Nelson v. Allen,* 117 Wis. 91, 93 N. W. 807; *Westra v. Roberts,* 156 Wis. 230, 145 N. W. 773.

Plaintiff also testified that defendant told him the soil of the city tract was very fertile and well adapted for a market garden. It was quite conclusively shown that the soil consisted of a black clay or muck that was not fertile and would cake and harden in dry weather and be impossible to work in wet weather. Defendant meets this charge by saying that no such representations were made and that since plaintiff examined the premises he had no right to rely upon the statements if made. Upon conflicting evidence the jury had a right to find that the alleged representations were in fact made. The evidence also shows that plaintiff visited the premises only once before the trade was made and that it was some time in March when there was snow, ice, and water upon the ground, and plaintiff claims it was not possible to examine the soil and he did not do so, but relied upon the defendant's representations as to its quality. The jury could properly find that there was no opportunity for adequate examination as to the quality of the soil. Under such circumstances the purchaser may rely upon the representations in respect thereto made by the seller. *Rogers v. Rosenfeld,* 158 Wis. 285, 149 N. W. 33; *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790, and cases cited *supra.*

Error is assigned because the court at the close of the evidence granted a view of the premises over defendant's objection. A view is had for the purpose of enabling the jury to understand and correctly weigh the evidence. *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328;

Munkwitz v. C., M. & St. P. R. Co. 64 Wis. 403, 25 N. W. 438; *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96, 29 N. W. 904.

If the evidence is conflicting the view may be used to aid the jurors in determining whose evidence is the more credible. *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328; *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96, 29 N. W. 904. Here the evidence as to the value of the city tract was conflicting and the court properly permitted a view to enable the jurors to more correctly weigh it. In *Serdan v. Falk Co.* 153 Wis. 169, 140 N. W. 1035, this court said:

"Under our practice and the provisions of sec. 2852, Stats., it rests within the sound discretion of the trial court whether or not a view shall be had. The exercise of such discretion cannot be successfully assigned as error unless palpably wrong and prejudicial," citing many cases.

In the instant case the discretion of the court was exercised in favor of justice.

It is claimed the damages are excessive. The court correctly instructed the jury that the measure of plaintiff's damage was the difference between the value of the house and tract of land as it actually was in March, 1917, and as it would have been had it been as represented. The proof of actual value took a wide range, and it is sufficient to say that the verdict is within the evidence and supported by it to such an extent that it cannot be disturbed by the court.

Defendant excepted to this instruction:

"But as to material misrepresentations relied upon by the purchaser, he having no knowledge or means of knowledge on the subject, the question whether in the exercise of ordinary care and prudence as an intelligent man he ought or ought not to have relied thereon is immaterial."

The defendant claims that this should have been qualified by the statement that where the buyer, having means of knowledge at hand and available and having inspected the

property to be purchased, does not avail himself of those means and opportunities, he cannot be heard to say that he was drawn into the bargain by the vendor's misrepresentations. Had defendant noted the sentence in the charge preceding the one excepted to he would undoubtedly not have taken any exception to it. That sentence reads:

"If false representations were made as to the value of the property and its quality as to productiveness, the plaintiff cannot recover damages for such misrepresentation, if in the exercise of ordinary care and prudence he ought not under the circumstances to have relied upon the representations."

It will thus be seen that the court imposed upon plaintiff the duty to exercise ordinary diligence to inform himself of the facts, but that, having exercised such diligence, he might recover though he was more credulous than the ordinarily careful and prudent man. The question in cases where material false representations have been established is, Was plaintiff actually misled by them? and not would an ordinarily careful and prudent man be misled by them. *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932.

The defendant excepted to this instruction:

"If you find that the representations or any of them were made, that they were false, relied upon by the plaintiff and caused his injury, it is immaterial whether the person making the same in good faith believed them to be true; that of itself would not defeat plaintiff's right to recover."

The correctness of the instruction is established by a long line of cases in our court, among which there are *Matteson v. Rice,* 116 Wis. 328, 92 N. W. 1109; *Standard Mfg. Co. v. Slot,* 121 Wis. 14, 98 N. W. 923; *Palmer v. Goldberg,* 128 Wis. 103, 107 N. W. 478; *Chalutz v. Wis. Cent. R. Co.* 143 Wis. 623, 128 N. W. 425; *First Nat. Bank v. Hackett,* 159 Wis. 113, 149 N. W. 703.

A number of exceptions were taken to remarks made by plaintiff's counsel in his argument to the jury. Most of

them were ruled out by the trial court and as to some of them the jury was instructed to disregard them. They consisted largely in the statements of conclusions which plaintiff's counsel claimed the evidence sustained. We have carefully examined all the remarks excepted to and are convinced that none of them prejudiced the jury in arriving at their verdict. No benefit would accrue to the legal profession by a detailed discussion of them.

The court submitted the case to the jury under instructions that were not only legally correct but that set forth fully the claims of both parties, and the jury reached a result sustained by the evidence.

By the Court.—Judgment affirmed.

SEIFERT, Appellant, vs. DIRK and wife, Respondents.

September 23—October 18, 1921.

Brokers: Commission agreement: Necessity: Quantum meruit: How pleaded.

1. Although sec. 2305*m*, Stats., provides that agreements to pay commissions for the buying or selling of real estate shall be void unless in writing, the common-law right to recover on *quantum meruit* still remains, and recovery may be had where the owner knowingly accepts and retains the benefits of the broker's services, even though there was no valid written memorandum.
2. To recover on *quantum meruit* the broker must properly plead such cause of action either originally or by amendment.

OWEN, ROSENBERRY, and JONES, JJ., dissent.

APPEAL from a judgment of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Reversed.*

The complaint alleged, in substance, that plaintiff is a real-estate broker and a licensed member of the Wisconsin Real Estate Board; that the defendants listed with him as such broker certain real estate of which they were the owners for sale or exchange; that the defendants promised and

agreed to pay plaintiff for his services in and about such sale or exchange the usual and customary brokerage or commission paid for such services in the city of Milwaukee, that is, three per centum of the price fixed, either for sale or exchange, of $17,000; that through the services of plaintiff an exchange was made of defendants' property with that of another owner of property and the defendants entered into possession and control of such other property pursuant to such exchange.

By stipulation between the parties there was inserted in the complaint, in order that the question here raised might be deemed to be squarely presented, the following: "That no contract in writing for a commission was entered into by and between plaintiff and said defendants."

It was further alleged "that the defendants became and are indebted to the plaintiff as a real-estate broker for the worth and value of the work, labor, and services performed and rendered by plaintiff for them in and about the said exchange of their property for said other property for which said defendants agreed to pay the plaintiff; that said services were and are reasonably worth the sum of $510."

It was also alleged that the said sum became due, that demand therefor was made and payment refused, and judgment was demanded for said sum of $510. The demurrer to such complaint being sustained and a judgment of dismissal being thereafter entered, plaintiff appealed therefrom.

For the appellant the cause was submitted on the brief of *F. P. Hopkins* of Milwaukee.

For the respondents there was a brief signed by *Otto A. Lemke,* attorney, and *Melville H. Sell,* of counsel, both of Milwaukee, and oral argument by *Mr. Sell.*

ESCHWEILER, J. The complaint was treated in the court below and on its presentation here as sufficient in form to state a claim upon *quantum meruit* as well as upon an express contract to recover for rendered and accepted services

in the exchange of real estate by the plaintiff as real-estate broker for the defendants. We shall so treat it here, though the language of the complaint, so far as it purports to set out a cause of action *quantum meruit,* may not be as precise and definite as the usual rules of pleadings for such cause of action require.

The demurrer to the complaint was sustained in the court below upon the view that since the enactment of ch. 221 of the Laws of 1917 there can be no recovery for services rendered by real-estate agents in procuring either a buyer or a seller of real estate, except and unless such express contract be in writing in accordance with the conditions specified in said chapter, and that failing such express contract there can be no recovery upon any implied contract to pay what the services were reasonably worth. Said ch. 221, Laws 1917, created a new section inserted in ch. 104, Stats., concerning "Fraudulent conveyances and contracts relating to real estate," and reads as follows:

"Section 2305*m*. Every contract to pay a commission to a real-estate agent or broker or to any other person for selling or buying real estate shall be void unless such contract or some note or memorandum thereof describing such real estate, expressing the price for which the same may be sold or purchased, the commission to be paid and the period during which the agent or broker shall procure a buyer or seller, be in writing and be subscribed by the person agreeing to pay such commission."

This precise statute has been before the court twice since its passage: in *Gifford v. Straub,* 172 Wis. 396, 179 N. W. 600, where the written memorandum relied upon was held not to be a compliance with this statute, and for that reason a judgment for the defendant was sustained, and in *Brown v. Marty,* 172 Wis. 411, 179 N. W. 602, where the written contract there sued upon was held to be sufficient. In neither of these cases, however, was the question now before us presented or considered.

The conclusion of the court below in sustaining the demurrer to each of the causes of action attempted to be set forth in the complaint herein is undoubtedly in accord with the general line of authorities upon statutes similar to the one here under consideration; it being generally stated that where a statute such as here requires written authorization, a broker who acts under an oral contract of employment cannot recover the value of his services as upon implied promise. 19 Cyc. 220; 4 Ruling Case Law, 300; 25 Ruling Case Law, 437. Such statement is supported by a number of decisions.

In *McCarthy v. Loupe,* 62 Cal. 299, passing upon the precise question here presented as to whether the right still existed to rely upon an implied promise to recover the value of such services rendered, it was held that, inasmuch as an express contract was required by statute, the law would no longer imply a contract. The rule has been repeatedly declared in that jurisdiction in many cases intermediate the decision above cited and the case of *Ryan v. Walker,* 35 Cal. App. 116, 169 Pac. 417. The same view is expressed in Indiana. *Selvage v. Talbott,* 175 Ind. 648, 95 N. E. 114, 33 L. R. A. N. S. 973, Ann. Cas. 1913C, 724, and again in *Peters v. Martin,* 69 Ind. App. 436, 122 N. E. 16.

In Idaho it was stated that to hold otherwise would be to absolutely nullify the statute. *Weatherhead v. Cooney,* 32 Idaho, 127, 180 Pac. 760.

In Michigan, while recognizing that recovery *quantum meruit* may be permitted for services actually performed under other kinds of contracts if void under the statute of frauds, yet it was held under just such a statute as here that to make the same rule applicable would nullify the new statute, and that as to this particular class of contracts no recovery could be had in any form of action in the absence of compliance with such a statute. *Paul v. Graham,* 193 Mich. 447, 160 N. W. 616; *Smith v. Starke,* 196 Mich. 311, 162 N. W. 998.

In Iowa, in passing upon a Nebraska statute, limited, however, to the obtaining of a purchaser only, it was held that an oral contract for such services, being invalid in Nebraska where made, could not be held valid or enforced in Iowa. *Brown & Brammer v. Wm. Pearson Co.* 169 Iowa, 50, 150 N. W. 1057. The Nebraska court so interpreted their statute. *Barney v. Lasbury,* 76 Neb. 701, 107 N. W. 989.

The same view is held in *Parker v. Bruggemann,* 72 Wash. 309, 130 Pac. 358.

In Oregon the statute made an agreement of such kind not valid unless in writing, but also provided that evidence of the agreement shall not be received other than the writing itself or secondary evidence thereof, and under such statute it was held that there can be no recovery as upon an implied contract. *Taylor v. Peterson,* 76 Oreg. 77, 147 Pac. 520.

In two jurisdictions acts have been passed punishing as a misdemeanor the offering to sell the real estate belonging to another without written authority. Upon an action brought to recover a commission the breach of such statute was urged as a defense, but it was held that such legislation was an arbitrary infringement upon the rights of persons engaged in a lawful occupation, but intimated that had it been an act for the purpose of regulating the business of brokerage or the statute of frauds a different question would be presented. *Frank L. Fisher Co. v. Woods,* 187 N. Y. 90, 79 N. E. 836, 12 L. R. A. N. S. 707. A similar penal statute was however held valid in Missouri and prevented the recovery of a commission for a sale made in violation of its terms. *Rothwell v. Gibson,* 121 Mo. App. 279, 98 S. W. 801.

We are compelled, however, to reach a contrary conclusion and hold that the common-law right to recover *quantum meruit* for services of such a nature as those here involved, the benefits whereof are knowingly accepted and retained by the party against whom the claim is made, still remains,

though the express contract under which the services were entered upon is declared to be void because not reduced to writing. Such right to recover *quantum meruit* is grounded in the common law. 1 Page, Contracts (2d ed.) § 30. It has long been firmly established here. *Wheeler v. Hall,* 41 Wis. 447, 450; *McMillan v. Page,* 71 Wis. 655, 661, 38 N. W. 173; *Miller v. Tracy,* 86 Wis. 330, 336, 56 N. W. 866; *Wojahn v. Nat. Union Bank,* 144 Wis. 646, 667, 129 N. W. 1068; *Grossbier v. C., St. P., M. & O. R. Co.* 173 Wis. 503, 509, 181 N. W. 746.

While it is undoubtedly true that the existence of an express contract between parties generally repels any inference of an implied contract for the same subject matter, nevertheless, where such express contract is void by reason of some provision of public policy as expressed in other than penal statutes, the possibility of an implied contract being inferred is not excluded. 3 Page, Contracts (2d ed.) § 1438.

There is no need here of considering, because of the substantial difference in the basis of the holdings, the many decisions declaring the doctrine that there can be no recovery in any form upon a contract which is made in violation of the provisions of a penal statute, such as for money loaned for gambling (*Schoenberg v. Adler,* 105 Wis. 645, 81 N. W. 1055), or those based upon a violation of the Sunday law (*Sentinel Co. v. A. D. Meiselbach M. W. Co.* 144 Wis. 224, 230, 128 N. W. 861; *Jacobson v. Bentzler,* 127 Wis. 566, 568, 107 N. W. 7); although as to even such void Sunday contracts, where services in intended compliance with such contract are thereafter rendered and the benefits thereof accepted, a recovery may nevertheless be had for their reasonable value. *Thomas v. Hatch,* 53 Wis. 296, 10 N. W. 393 (where pleadings were allowed to be amended on the trial to change the cause of action from the express contract made on Sunday to one on implied contract); *King v. Graef,* 136 Wis. 548, 117 N. W. 1058 (sale of personal prop-

erty made on Sunday and delivery on secular day); *Wausau L. Co. v. Industrial Comm.* 166 Wis. 204, 206, 164 N. W. 836.

The substance of the old English statute of frauds, aimed to prevent perjury and the establishing of unjust and unfounded claims (*Baumgarten v. Cohn,* 141 Wis. 315, 124 N. W. 288; *Gifford v. Straub,* 172 Wis. 396, 400, 179 N. W. 600) relating to contracts, has continuously appeared as a part of our statutory law since at least as early as the revision of 1849. The two concerning real estate are sec. 2302, providing in substance that no estate or interest in lands (other than leases not over one year) shall be created, etc., unless by act or operation of law or by deed or conveyance in writing, and sec. 2304, which makes *void* every contract for leasing of real estate for a longer period than one year or for the sale of any lands or interest therein unless the contract or memorandum thereof expressing the consideration is in writing and properly subscribed.

As to contracts relating to personal property and services, sec. 2307 declares *void* every agreement that by its terms is not to be performed within one year from the making thereof unless expressed in writing, etc. That the latter two of these sections contain the word "void," while such word does not appear in sec. 2302, *supra,* makes no material difference in the consideration of the question here presented.

The new statute, sec. 2305*m,* now before us, is no more drastic or emphatic as to the necessity of a writing and the effect of the failure thereof than is the language of the other provisions of the statute of frauds above mentioned. As to each of such earlier provisions of the statute of frauds it has uniformly and consistently been held that, even though a party may bring his action to recover, basing it in the first instance upon a contract which must be declared void by reason of such statutes, he may nevertheless be permitted, upon proper pleading, to disregard and hold as naught such express contract and recover the reasonable value thereof

upon an implied contract to pay for the same subject matter as that included and covered by the express contract. The fact that the parties did enter into the undertaking in supposed compliance with such express contract is not a bar to the right to recover under such implied contract.

Such is the effect of the following and other cases: *Clark v. Davidson,* 53 Wis. 317, 10 N. W. 384, one taking possession of a farm under a parol agreement void under sec. 2302, *supra,* and performing labor thereon may recover *quantum meruit* (p. 323).

An oral contract for services rendered under a promise to devise and bequeath real and personal property as compensation for such services being void under sec. 2304, Stats., as to the real estate and being indivisible, void in part, and failing wholly, does not prevent the right of the person rendering such services to recover therefor *quantum meruit.* Among the many cases so holding are the following: *Ellis v. Cary,* 74 Wis. 176, 42 N. W. 252; *Estate of Kessler,* 87 Wis. 660, 667, 59 N. W. 129; *Martin v. Estate of Martin,* 108 Wis. 284, 84 N. W. 439; *Loper v. Estate of Sheldon,* 120 Wis. 26, 32, 97 N. W. 524; *Taylor v. Thieman,* 132 Wis. 38, 45, 111 N. W. 229; *Laughnan v. Estate of Laughnan,* 165 Wis. 348, 162 N. W. 169; *Nelson v. Christensen,* 169 Wis. 373, 172 N. W. 741.

In *Koch v. Williams,* 82 Wis. 186, 191, 52 N. W. 257, the same rule was recognized in an action for architects' services rendered under an express contract to pay therefor by the conveyance of land which defendant offered to do, yet nevertheless the plaintiffs were permitted to disregard the express contract and to recover on *quantum meruit* as the inevitable result of holding the contract void; this court in that case adopting what was said in *Salb v. Campbell,* 65 Wis. 405, 27 N. W. 45, that the parties in such a situation stand as though no contract existed between them. In *Seifert v. Mueller,* 156 Wis. 629, 146 N. W. 787, a similar result was reached as in *Koch v. Williams, supra,* the express

agreement being for services of a real-estate broker, as in this case. *Draheim v. Evison,* 112 Wis. 27, 87 N. W. 795, an oral contract for labor on a farm void under sec. 2307, Stats., being for a period longer than one year, yet for the services rendered recovery might be had upon *quantum meruit.* In *Cohen v. Stein,* 61 Wis. 508, 21 N. W. 514, the express contract was for services of husband and wife for more than a year and void under sec. 2307, still recovery was permitted on *quantum meruit.* To the same effect, *Chase v. Hinkley,* 126 Wis. 75, 105 N. W. 230.

It is of course necessary in all such situations that the matter should be presented properly by pleadings either originally or by amendment, otherwise the party must stand or fall on his express contract. *Pearson v. Kelly,* 122 Wis. 660, 100 N. W. 1064; *Manning v. School Dist.* 124 Wis. 84, 104, 102 N. W. 356; *Gist v. Johnson-Carey Co.* 158 Wis. 188, 203, 147 N. W. 1079.

We can see no logical basis for applying a different rule of construction for this new provision from that long given to the older statutes, or why the term *void* should be more far reaching when inserted in the modern than when used in the older statutes.

The former statutes have been consistently held to affect only the express and not the implied contract. That has been left as at common law and practically unimpaired, and no change has been made by legislative declaration to the contrary in all these years of repeated judicial interpretations of these provisions of the statute of frauds. The new provision is to effect the same general purpose, is imbedded in the same surroundings as is its elder sisters, and should receive similar treatment. There is no more nullification of the new by the present holding than of the older statutes by the former rulings of that court as cited *supra.*

We hold, therefore, that sec. 2305*m,* Stats., makes void the express contract only, and that the right to recover, under the proper state of facts, *quantum meruit,* upon the implied

promise to pay for such services rendered, the benefits whereof are accepted, has not been legislated out of existence.

It follows therefrom that the demurrer to the complaint, so far as it stated a cause of action upon *quantum meruit,* should have been overruled.

By the Court.—Judgment reversed, and the cause remanded with directions to overrule the demurrer to the plaintiff's complaint.

OWEN, J. (*dissenting*). There is a no more fundamental rule than that in the construction of a statute the intention of the legislature in enacting it should be given effect. In ascertaining the intent of the legislature "the court can and should consider the 'surrounding circumstances, the existing condition of things, the evils to be remedied, the objects to be attained, look at the whole and every part of the statute and the apparent intention derived from the whole, to its subject matter, to its effects and consequences, and to the reason and spirit, and thus ascertain the true meaning of the legislature.' " *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 9, 128 N. W. 1041.

Sec. 2305*m,* Stats., has been before this court on two prior occasions. *Gifford v. Straub,* 172 Wis. 396, 179 N. W. 600; *Brown v. Marty,* 172 Wis. 411, 179 N. W. 602. No doubt was then entertained concerning the object and purpose of the legislature in enacting the statute. In the former case it was said:

"The statute was doubtless enacted for reasons similar to those which led to the enactment of the statute of frauds. It was to prevent frauds and perjuries. Its enforcement will sometimes protect brokers who have rendered valuable services too little appreciated. More often it will protect owners from unfounded claims. It will tend to prevent the flood of litigation arising out of misunderstandings between well-meaning persons."

It is notorious that claims made by real-estate brokers

against owners of property for commissions arising from the sale of land, which claims were often founded upon mere casual conversations the owners did not understand to amount to a contract, have been a most fruitful source of litigation. It was for the purpose of suppressing litigation of this kind that the legislation was enacted. The construction placed by the court upon sec. 2305*m* again opens the floodgates for such litigation and leaves the matter worse than if no legislation had been enacted.

Previous to the enactment of the statute the owner could at least limit his liability by an oral contract. This he cannot now do. Although the oral contract be held void, nevertheless the broker may bring action to recover for the reasonable value of his services. By virtue of the construction placed upon it by the decision in this case, the legislative purpose in enacting the statute is defeated, and its effort to suppress actions of this kind is rendered entirely futile. I contend that where the purpose of the legislature in enacting a statute is so plain as to have received affirmative expression in the decisions of this court, no rule of construction, no precedent of prior judicial decision, should be held sufficiently potent to prevent a construction which will give effect to the plain legislative intent. I have supposed that the office of accepted rules for the construction of statutes was to enable the court to discover and give effect to the legislative intent, and that all rules must be subordinated to the dominating rule that statutes must be construed so as to effectuate the legislative purpose. It seems clear to my mind that this has not been done in the instant case. I think it was the purpose of the legislature to prohibit any recovery of broker's commissions for the sale of real estate unless the right to that commission should be established by a written contract. I think the trial court was right and that the judgment should be affirmed.

I am authorized to state that Mr. Justice Rosenberry and Mr. Justice Jones concur in this dissenting opinion.

CARL HARTMAN COMPANY, Respondent vs. FRIDAY, Appellant.

September 23—October 18, 1921.

Fraud: Evidence: Sufficiency.

In an action for the buyer's failure to perform a contract for the sale of an engine and boiler, in which the buyer counterclaimed for false representations by the seller, and all issues as to false representations were found by the jury in the seller's favor except as to representations concerning the condition of the front of the boiler, which was not submitted to them, it is *held* that the evidence as to this alleged misrepresentation is insufficient to make a jury question.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Plaintiff, a dealer in new and second-hand machinery at Green Bay, Wisconsin, under a written contract sold and delivered to defendant at Beaver Dam, Wisconsin, an engine and boiler, each second-hand. Plaintiff brought this action to recover damages of defendant for his partial failure to carry out the contract. Defendant answered and also counterclaimed.

The substance of the counterclaim, so far as necessary here, was to the effect that certain material and false representations were made by plaintiff's president with reference to certain conditions and qualities of the boiler. In the special verdict as submitted to the jury such questions were answered in plaintiff's favor. In addition to the issues so contained in the special verdict defendant insisted on the trial, and now here, that the court should have also submitted to the jury questions concerning certain other alleged misrepresentations by plaintiff's agent to defendant concerning the front of said boiler.

The court held that the evidence did not warrant a submission of any such issues to the jury, and upon such ruling and the special verdict he directed judgment dismissing the

counterclaim and granting damages to the plaintiff upon its cause of action. From such judgment the defendant has appealed.

For the appellant there was a brief by *Clark & Lueck* of Beaver Dam, and oral argument by *A. W. Lueck.*

C. W. Lomas of Green Bay, for the respondent.

Eschweiler, J. The engine and boiler in question had been in use in or near Green Bay prior to the time of the contract between the parties. The boiler was one of a set of several boilers, but the front for it as sold to the defendant was, to his knowledge, from a different boiler, and it had been stored in another yard than where the boiler itself was at the time of the sale.

Defendant's contention here presented arises from the fact that the front which was sold and subsequently placed by him upon the boiler had doors therein not sufficiently large to permit of the separate taking out on each side of five of the outermost of the sixty or seventy flues therein contained. In case of removal, however, of all the flues at one time, these ten could be taken out with the others and be removed through the manhole. Their separate removal, however, would require the taking down or apart of the front. There was no testimony as to how often it might reasonably be anticipated that such outer flues would require separate removal or what the necessary expense would be in such case; the only testimony in that regard being by plaintiff to the effect that such a removal and replacing of the front could be done by three men in an hour.

The court refused to submit to the jury any question upon what defendant claims were material representations by plaintiff in connection with this boiler front on this particular point. The only testimony in the record upon which such questions could have been properly submitted to the jury, if at all, was that by the defendant himself. He testified that

the plaintiff said this front was of the proper size for that boiler; and again, "He [plaintiff's president] didn't say anything particular in regard to the doors, but the front was supposed to be in usable condition and proper to fit this boiler. That was the representation that he made."

Defendant nowhere testifies that he relied in making this purchase upon anything in the nature of a representation with reference to the matter here involved, and on repeated questions in direct examination as to the consideration that induced him to enter into this purchase, the only one he gives is the statement he claims plaintiff made to him that there would be an inspection by an official boiler inspector of an insurance company and submitted to him. The issue presented on this latter feature was submitted to the jury and decided by them against defendant's contention.

The defendant had ample opportunity to examine and did examine the boiler itself twice and this particular front once before the purchase. There was no concealment or fraud by the plaintiff shown. We think the court was justified in its rulings on the grounds that there was no material representation made by the plaintiff in that regard and that defendant had ample opportunity, and availed himself of it, to ascertain all the facts before he signed the contract.

Complaint is also made by appellant as to the court's ruling in the admission of certain testimony by one of plaintiff's witnesses. We do not deem the admission of such testimony, were it erroneously received, to have been a prejudicial error, and it becomes immaterial in view of the disposition that is now being made of this case.

By the Court.—Judgment affirmed.

BEEBE, Respondent, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant.

April 6—May 3, 1921.
October 21—November 15, 1921.

Railroads: Torts committed while under federal control: Director general of railroads: Party defendant.

Since the decision of this court in *Franke v. C. & N. W. R. Co.* 170 Wis. 71, the supreme court of the United States has held that under sec. 10 of the Federal Control Act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), and Order No. 50 of the director general of railroads, an action of this kind (negligently setting fire to plaintiff's property) may not be maintained against the corporation owning the railroad, but must be brought against the director general.

APPEAL from a judgment of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Reversed.*

Action to recover damages caused by a fire. The case was tried before a jury, which returned a special verdict, wherein it was found (a) that the fire was started on defendant's right of way by a spark from a locomotive engine on its railroad and then communicated to the plaintiff's property; (b) damages in the sum of $818.72; (c) that after discovering the fire plaintiff failed to exercise ordinary care to extinguish it and to save his property from further destruction; and (d) that if plaintiff had used ordinary care in extinguishing the fire after his discovery thereof, damage to the amount of $98.25 could have been prevented. The court rendered judgment in favor of the plaintiff and against the defendant for the amount of damages found, less the amount of damages which the jury found could have been prevented had plaintiff exercised ordinary care in extinguishing the fire after his discovery thereof. From such judgment defendant brings this appeal.

For the appellant there was a brief by *A. H. Bright* of

Minneapolis, attorney, and *Paul Stover* of Milwaukee, of counsel, and oral argument by *W. A. Hayes* of Milwaukee.

For the respondent there was a brief by *J. W. Carow,* and oral argument by *Charles Kirwan,* both of Ladysmith.

The following opinion was filed May 3, 1921:

OWEN, J. This action is founded on sec. 1816*a*, Stats., which makes every railroad corporation owning or operating a railroad in this state responsible for damages occasioned by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, or by the burning of grass, weeds, or rubbish on right of way by employees of such corporation. During the trial it was stipulated that the railroad, prior to January 1, 1918, was under the control and operated by the defendant, but that since said date said railroad has been exclusively operated and controlled by the director general of railroads of the United States railroad administration. The contention of appellant is that the action was improperly brought against the defendant company because, at the time of the fire, it did not operate the railroad, and that by virtue of the provisions of the Federal Control Act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25, sec. 10), and General Order No. 50, issued by William G. McAdoo, director general of railroads, under date of October 28, 1918, this action should have been brought against the director general of railroads, and that it cannot be maintained against the defendant railroad company.

The question thus raised on this appeal was passed upon by this court in *Franke v. C. & N. W. R. Co.* 170 Wis. 71, 173 N. W. 701, adversely to defendant's contention, and, while we are strongly urged to reconsider it, we adhere to the decision there made. The question is one upon which the courts, and especially the federal courts, are in hopeless conflict. It has not yet been determined by the federal supreme court, which is the ultimate authority upon the subject. We

have re-examined a large number of the cases in which the question has been considered, and we see no reason for receding from our decision in the *Franke Case*. We therefore hold that the action was properly brought against the railroad company.

It is next claimed by the appellant that the finding of the jury to the effect that the fire originated on the defendant's right of way by a spark from a locomotive engine on its railroad is not supported by the evidence. The evidence on this question is circumstantial, but we think it is sufficient to support the finding. A witness who was working in the field adjacent to the tracks testified that he saw a freight train going by that morning; that it was going up a grade, laboring hard and running very slow; about half an hour after the train passed he observed smoke rising above the trees. The plaintiff testified that when he discovered the fire he looked to see where it had originated, and found that it had started within a few feet of the tracks and had burned south from there through the fence on his land. It appeared that the wind was from the north or northeast; that there were no other fires in the vicinity at that time, and there is nothing in the evidence to indicate that the fire might have originated from any other cause. When the section foreman heard of the fire he took six men to the scene, worked about an hour and a half, and thought they had the fire under control. It broke out again later on the same day, when the sectionmen returned and worked two or three hours in putting out the fire. The plaintiff testified that he could tell from the appearance of the ground where the fire had first started; that there was a strong wind blowing from the north and that it would not work against the wind; that while the fire would crawl against the wind there was not enough material on the right of way to feed it against the wind. We think the jury was abundantly justified in drawing the inference from this evidence that the fire was started by a spark from the locomotive.

It is also contended that the judgment should have been in favor of the defendant because the jury found that the plaintiff was guilty of contributory negligence in not making greater effort to extinguish the fire after discovery thereof. It will be conceded, of course, that any want of ordinary care on the part of the plaintiff after discovery of the fire will not defeat his right to recover the damages occurring before the discovery of the fire. The amount of damage that could have been prevented had the plaintiff used ordinary care after the discovery of the fire was peculiarly a jury question. The question seems to have been submitted to the jury upon proper instructions, and we cannot say that its finding in such respect is unsupported by the evidence.

By the Court.—Judgment affirmed.

DOERFLER, J., took no part.

On July 13, 1921, a motion by the appellant for a rehearing was granted, and the following opinion was filed November 15, 1921:

OWEN, J. Since the decision of this court affirming the judgment in this case the supreme court of the United States has squarely held that under the Federal Control Act and Order No. 50 of the director general of railroads announced under date of October 28, 1918, an action of this kind may not be maintained against the corporation owning the railroad, but that by virtue of sec. 10 of said act and said General Order No. 50 it can be maintained only against the director general of railroads. *Missouri Pac. R. Co. v. Ault* (decided June 1, 1921) 41 Sup. Ct. 593. It follows that the action should have been dismissed.

By the Court.—The former judgment affirming the judgment is set aside, and the judgment appealed from is reversed and the cause remanded with instructions to enter judgment dismissing the complaint.

O'BRIEN, Respondent, vs. FRED KRONER HARDWARE COMPANY, Appellant.

June 1—November 15, 1921.

Explosives: Child taking unguarded dynamite caps: Negligence: Death: Criminal intent of children: Presumption: Degree of proof: Municipal ordinances: How pleaded: Judicial notice.

1. A city ordinance is not properly pleaded where the portions of the ordinance recited in a complaint show that a section of such ordinance not set forth is necessary to be known to determine the acts forbidden; and the court cannot take judicial notice of the ordinance.
2. Under the common law, in this respect still unchanged in Wisconsin, a child under the age of fourteen is entitled to the presumption that there is a want of sufficient understanding or mental capacity to form a criminal intent. In a criminal case this presumption must be overcome by evidence which satisfies beyond a reasonable doubt, but in a civil action a clear and satisfactory preponderance of the evidence suffices.
3. A complaint by a widowed mother which is construed on appeal to allege that her thirteen-year-old boy, without felonious intent, took dynamite caps stored by the defendant outside of its building but on its premises and adjacent to a public alley in which, to defendant's knowledge, children were accustomed to play, and that the boy took the caps on a visit to a neighboring state, where as a result of an explosion while playing with the caps he was killed, states a cause of action.

APPEAL from an order of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The substance of the lengthy complaint is as follows:

Plaintiff is the mother of a boy, Adena Hopkins, who was killed October 22, 1919, then of the age of thirteen; that the father of the boy was dead and the mother would have been entitled to the earnings of the infant until his majority and had reason to expect assistance from him if he had lived until that period.

That the defendant, a Wisconsin corporation, is a wholesale and retail dealer in hardware and also deals in dynamite exploders or fulminate caps, which are articles liable to ex-

plode if picked with a pin or knife. That the defendant owned a building in La Crosse extending about 100 feet across a lot of about 150 feet; that the fifty feet in the rear of said building extended to the public alley, and that such place and the adjoining place in the rear of said building and of the other buildings in said alley had been, to the knowledge of the defendant, used by children in that vicinity for playing games.

That defendant's building was used by it for storage purposes on both the first and second floor, and that the building had been allowed to become out of repair, with the rear door thereof, opening onto said vacant places, left open and unlocked, and the panes of glass alongside such door were broken; that there was a stairway in the rear of the building from the first to the second floor, with a door on the second floor also left unlocked, and that the windows on the second floor had been broken for a long time. That prior to October 17, 1919,

"the defendant carelessly and negligently and in violation of the law and statutes of the state of Wisconsin in such case made and provided and the ordinances of the city of La Crosse, and especially section No. 4 of ordinance No. 37 of the city of La Crosse, *left on the ground near the door in the rear of the first floor of said building,* wholly exposed and accessible to children of tender years, refuse and empty boxes, among which was a wooden box, which said box contained tin boxes containing dynamite exploders or caps, the property of said defendant; that said exploders or caps are about one and one-half inches long and about the size of a percussion cap, and that said tin boxes containing said caps or exploders were covered and surrounded with sawdust."

"That said section 4 of ordinance No. 37 is as follows: '*Powder magazines to be approved by council*—Section 4. All gunpowder and other explosive materials of the kind hereinbefore mentioned except as provided in section 3 of this ordinance, brought within the corporate limits of this city for sale or other purposes, shall be deposited and kept in such powder magazine or magazines as may from time to time be approved of and designated for that purpose by the

common council; and no person shall keep or have or suffer to be kept or had in any building or place by him or her owned or occupied in this city, except in the said powder magazine or magazines, any greater quantity of gunpowder or other explosive materials than is mentioned in the third section hereof for any longer period than twelve hours. Any person violating any provision of this section shall, upon conviction thereof, be punished by fines of not less than ten dollars, nor more than one hundred dollars.' "

(Section 3 mentioned in the foregoing section 4 of the said ordinance is not quoted or otherwise mentioned.)

That on said October 17, 1919, the boy Adena with a number of other boys was attracted to the defendant's old and dilapidated building and the refuse in boxes lying near the door.

"That by reason of the carelessness and negligence of defendant in allowing said building to become out of repair, and the carelessness and negligence of the defendant in leaving said refuse and empty boxes and said box of exploders and caps hereinbefore mentioned open and exposed, the said Adena Hopkins discovered said box of caps and exploders, and then and there reached his hand into said wooden box and obtained two of the tin boxes containing said caps and exploders and carried them to his home in the city of La Crosse. . . . That the said Adena Hopkins was then of the age of thirteen years, and had no experience whatever with exploders or caps, and had no knowledge or information of the dangerous composition of said caps or exploders or their use or the great peril and danger incurred in handling the same, nor was there anything in the construction or appearance of said caps and exploders to cause a child of the age of the said Adena Hopkins to believe that there was danger in handling the same."

That on October 21, 1919, the said Adena took the box with the caps and exploders to his grandmother's home in McGregor, Iowa.

That on October 22, 1919, at said home in McGregor, Adena, in total ignorance of the danger and peril of handling said caps and exploders, and on account of his youth and in-

experience and want of judgment, attempted to pick out the fulminate composition in said caps with a hat-pin, and while so engaged the caps and exploders exploded and as a result the said boy was killed.

"That the injuries hereinafter described were received by the said Adena Hopkins without any fault on his part; that the said Adena Hopkins was then and there totally ignorant of the danger of said caps exploding, and that said injuries were due wholly to the carelessness and negligence of the defendant in leaving said box containing said caps and exploders in said open and exposed place hereinbefore described so that the said Adena Hopkins and other children playing in said vicinity as hereinbefore alleged had access to them and through childish curiosity were attracted to said box and caps by reason of their attractive appearance. That said Adena Hopkins was of immature judgment, discretion, and experience and was not aware that he was committing a wrong or an offense in taking said boxes of exploders or caps, at the time set forth herein."

The defendant demurred on the ground that the complaint on its face did not state facts sufficient to constitute a cause of action. From the order overruling such demurrer defendant has appealed.

For the appellant there was a brief by *George H. Gordon, Law & Gordon* of La Crosse, and oral argument by *George H. Gordon.*

F. E. Withrow of La Crosse, for the respondent.

ESCHWEILER, J. It is to be gathered from the complaint that the pleader intends to charge that defendant's negligence, if any, arises from leaving exposed on the ground near the door of defendant's warehouse, either just within or just without the building, certain dynamite exploders or caps which were in tin containers, the containers being packed in sawdust in a wooden box; that such box was wholly exposed and accessible to children of tender years; and that such acts were "in violation of the law and statutes of the state of Wisconsin in such case made and provided

and the ordinances of the city of La Crosse, and especially section No. 4 of ordinance No. 37 of the city of La Crosse."

No statute of the state is called to our attention, nor can we find any, which could be considered as having been violated by the defendant under the facts recited. There is nothing in secs. 4393*a*—1 to 4393*a*—7, Stats., inclusive, regulating the manufacture and storage of gunpowder or blasting powder; or in sec. 4398*a*, prohibiting the sale or transportation of explosives for unlawful purposes, or in sec. 4398*f*, as to the storage or keeping of fireworks or firecrackers containing dynamite or other high explosives, that can be deemed in any way applicable to the present situation.

It is also evident that the ordinance of the city of La Crosse upon which plaintiff appears to rely is not sufficiently or well pleaded. The portion recited in the complaint and quoted *supra* shows on its face that sec. 3 of such ordinance is necessary to be known or shown in determining what is or what is not forbidden by the ordinance. For default of proper pleading thereof the court cannot take judicial notice of such ordinance. *State ex rel. Leiser v. Koch,* 138 Wis. 27, 29, 119 N. W. 839; Jones, Evidence (2d ed.) § 116.

In order to sustain the complaint, therefore, as stating a cause of action against the defendant, it must appear therefrom that there was a breach by defendant of some common-law duty or obligation resting upon it towards the unfortunate boy whose distressing and untimely death is the reason for the bringing of this action.

It is extremely difficult from the language of the complaint to ascertain whether the pleader intended to allege that the wooden box holding the tin containers with the explosives was placed inside or outside of defendant's storage or warehouse building. The complaint as a whole, with its minute description of the condition of the building not only on the first but on the second floor, with the door in the rear left open and the windows on both floors broken, would strongly indicate that the pleader intended to charge negligence in

leaving such dangerous articles within such a dilapidated building open and accessible to children playing in the alley or the adjacent open space in the rear of such building, for it is evident that were they stored outside and in the vacant space of fifty feet in the rear and adjoining the alley, then the condition of the building itself would be entirely immaterial. In the memorandum filed by the trial court in disposing of the demurrer he does not state his conclusion on such question, merely stating that the negligence consists in leaving the articles on the premises of the defendant, which statement of course would be equally correct if it referred to the storage on defendant's lot and either within or without the building. The appellant construes the complaint to allege that the box was stored within; the respondent, that the box was placed outside of the building.

Under the liberal rule that has been adopted and is being followed by this court in the construction of pleadings (*Herrem v. Konz,* 165 Wis. 574, 162 N. W. 654), we shall assume for the present disposition of this case that it was intended by the pleader to charge that the wooden box in question in which were stored the dynamite exploders was outside of the walls of such warehouse and on the ground in the rear of the building but upon the fifty feet of vacant lot between the adjacent alley and the rear of such building. Any question, therefore, as to what might be defendant's obligations or liabilities if, as a matter of fact, the box with the exploders was stored inside the four walls of defendant's building, is not passed upon on this appeal and we shall not express any opinion thereon.

The thirteen-year-old boy, Adena, being under the age of fourteen, was within the period of life during which the common law, still unchanged in this state, has declared he is entitled to the presumption that there is a want of sufficient understanding or mental capacity to form a criminal intent—the necessary and essential element which must be found to exist before a conviction can be properly had of

one prosecuted for a breach of the penal statutes as to such offenses as larceny. Up to the age of seven years the presumption is conclusive; from then on it is a diminishing one until it disappears at the age of fourteen. During the period between seven and fourteen, "the dubious stage of discretion" (4 Bl. Comm. 223), it is rebuttable, and the state must overcome it in criminal prosecutions by evidence which satisfies beyond a reasonable doubt, the test being not only whether the child so charged appreciates the moral difference between right and wrong, but also that the act in question in any particular case is a violation of the law. 22 Cyc. 623; 14 Ruling Case Law, p. 264; *Comm. v. Mead,* 10 Allen (92 Mass.) 398; *Allen v. U. S.* 150 U. S. 551, 558, 14 Sup. Ct. 196; *State v. Yeargan,* 117 N. C. 706, 23 S. E. 153, 36 L. R. A. 196.

The same presumption exists as to wilful trespass. *Folsom-Morris C. M. Co. v. De Vork,* 61 Okla. 75, 160 Pac. 64, L. R. A. 1917A, 1290.

In such a civil action as this, undoubtedly, the rule would be that the presumption here indulged in need not be overcome, as in criminal prosecutions, beyond a reasonable doubt, but only by the lower degree of proof, that is, such as will overcome the weight of the presumption by a clear and satisfactory preponderance of the evidence, but more, of course, than the mere fair preponderance—the requirement as to the usual issues of fact in civil cases. *Poertner v. Poertner,* 66 Wis. 644, 647, 29 N. W. 386; *Peterson v. Lemke,* 159 Wis. 353, 355, 150 N. W. 481; *Murphy v. Estate of Skinner,* 160 Wis. 554, 563, 152 N. W. 172; Jones, Evidence (2d ed.) § 195.

It must therefore be assumed in the present disposition of this case that there was no criminal intent on the part of the boy Adena of violating any penal statute in removing the tin containers from the wooden box. This therefore makes it unnecessary to determine what are the liabilities or obligations of one situated as was the defendant here towards

another who is subsequently injured after feloniously taking the personal property of such a defendant, and on such a question we express no opinion here.

Assuming, therefore, the absence of any felonious taking by the boy, that the wooden box of containers and exploders was stored by defendant, knowing their dangerous nature, outside of the building and in an open space upon defendant's own premises but adjacent to a public alley, in which space and alley, to defendant's knowledge, children were accustomed to gather and play, and further that these articles were so taken by the boy in a spirit of play and as a plaything, and that such exposure of such dangerous articles was the proximate cause of the distressing death which followed, we hold that the complaint sufficiently states a cause of action, and that the ruling of the trial court to that effect was proper and must be upheld under such decisions as *Herrem v. Konz,* 165 Wis. 574, 162 N. W. 654, and cases there cited.

A number of decisions from other jurisdictions have been examined on this question of the liability of one who stores or exposes such explosive substances at a place accessible to and frequented by children. Many will be found in a note to *Folsom-Morris C. M. Co. v. De Vork,* 61 Okla. 75, 160 Pac. 64, as given in L. R. A. 1917A, 1295.

In the last cited case a defendant was held liable for a resulting injury from lighting a train of powder which had been scattered by children from cans containing small amounts of powder and left upon defendant's premises where the accident occurred.

In *Perry v. Rochester L. Co.* 219 N. Y. 60, 113 N. E. 529, L. R. A. 1917B, 1058, it was held there was no liability by one who, in violation of an ordinance, stored a chest containing nitroglycerine caps on public lands in a city where two boys, thirteen and twelve years old respectively, took some of the caps away from that place and, hiding them for the night, used them the following day with a resulting explosion causing the death of a third child; but, as was there

indicated, the evidence showed that the original taking away was for profit and not for play and was in the nature of a theft; that the remoteness of time and space was an important element in the court's holding that such result was not within the field of reasonable anticipation, and therefore the storage was not the proximate cause of the injury within the meaning of the law.

That case approves of the rule given in two Massachusetts cases: *Horan v. Watertown,* 217 Mass. 185, 104 N. E. 464, holding a town not liable for personal injuries caused by the explosion of dynamite by boys who had taken it from a tool chest which the employees of the town had left unwatched and unguarded on the highway, the ruling being based upon the ground that the defendant was not bound to anticipate the theft of such article and its subsequent use in play; and *Jacobs v. N. Y., N. H. & H. R. Co.* 212 Mass. 96, 98 N. E. 688, where the injury occurred by the explosion of a signal torpedo ten days after it had been carried away by the intestate's companions, again on the ground that such was not within the field of reasonable anticipation. Also *Afflick v. Bates,* 21 R. I. 281, 43 Atl. 539, which held that there was no liability on the part of the city where explosive caps were kept in a large tool chest on a vacant lot, some of the caps being found on the ground by two boys nine and eleven years old and taken by them and given to another boy aged fourteen, who in playing with them injured the infant plaintiff, the ruling being based either on the ground that the city was not bound to guard against the mischievous and unlawful acts of the persons who originally removed the caps, or that the carelessness of the boy in exploding them was an intervening cause.

Hall v. N. Y. Tel. Co. 214 N. Y. 49, 108 N. E. 182, holds that no liability could be maintained against defendant whose servants used denatured alcohol, a poison, and left a bottle of such fluid standing by the roadside, where the plaintiff, aged nine, and the brother, seven years of age, took the

bottle home, poured some of the contents on the grass and the younger brother set fire to it and the plaintiff was burned, because the facts did not show a condition within the field of reasonable anticipation.

There are cases in which the defendant was held not liable because there was some substantial interval of time and space intervening the taking away of the dangerous explosive and the explosion itself, such as *Carpenter v. Miller & Son,* 232 Pa. St. 362, 81 Atl. 439, 36 L. R. A. N. S. 932; *Bennett v. Odell Mfg. Co.* 76 N. H. 180, 8 Atl. 642.

Other cases again sustain the view that liability arises even where considerable time has elapsed. *Barnett v. Cliffside Mills,* 167 N. C. 576, 83 S. E. 826; *Mathis v. Granger B. & T. Co.* 85 Wash. 634, 149 Pac. 3; *Mills v. Central of Georgia R. Co.* 140 Ga. 181, 78 S. E. 816. In this latter case the injury was caused to a boy eight years old by the exploding of a track torpedo picked up by a fifteen-year-old brother not knowing of the incident danger. *Juntti v. Oliver I. M. Co.* 119 Minn. 518, 138 N. W. 673, 42 L. R. A. N. S. 840, where a defendant left unguarded on its premises near a public street a dangerous substance knowing that children were in the habit of using such substance by pouring water on it, and where a five-year-old child so finding and using it was injured. *Eckart v. Kiel,* 123 Minn. 114, 143 N. W. 122, where a defendant was held liable for leaving dynamite caps in his granary in his barn which he then sold, and sometime thereafter the buyer's son found the same and was injured by the explosion.

In the case at bar we have both remoteness of time and space from the place where the explosive was found and the place where the injury occurred. That, as a fact, may be of considerable weight in the final determination of this case by jury or court as to whether the unfortunate result here was within or without the field of reasonable anticipation; but we are not prepared to now hold upon the complaint and as a conclusion of law that it was without such field. On the

other hand, there was here no intervening act by another human agency than the boy himself, such as is held in some of the above cited cases to be such an interrupting cause as breaks the chain of causal connection between the alleged negligence and the result for which a liability is claimed.

The demurrer to the complaint as we now construe it was therefore properly overruled.

By the Court.—Order affirmed.

ROSENBERRY, J., dissents.

ESTATE OF JOHNSON: BUTH, Administrator, Appellant, vs. DAVIS, Respondent.

September 20—November 15, 1921.

Dower: Tenancy in common before assignment: Insurable interest of dower tenant: County court: Jurisdiction: Claims against decedents.

1. The widow and heirs of a decedent are tenants in common until assignment of dower, and prior to such assignment the widow has no vested freehold estate.
2. Where the homestead of decedent was assigned to his daughter subject to the dower and homestead rights of the widow, who within a year remarried, a parol agreement between the daughter and the widow to the effect that the widow was to continue to occupy the premises rent free in consideration of keeping them insured could not affect the nature of the interest which the widow had in the real estate at the time of her death, her dower interest being unassigned and unadmeasured.
3. The tenant in dower had an insurable interest in the premises, and when her administrator collected the proceeds of the policy he held them for the proper owner; and while no claim need be filed against her estate, the county court had jurisdiction to determine the ownership of the fund in an action to charge the administrator as a trustee of funds in his possession.
4. The tenant in dower having lost her life in the fire which destroyed the premises, she had no interest in them when the loss occurred, and the proceeds of the policy belong to the owner in fee.

APPEAL from a judgment of the county court of Shawano county: F. A. JAECKEL, Judge. *Affirmed.*

Charles Johnson died intestate in the year 1914. Appropriate proceedings were had in the county court for the probate of his estate, and, by the final decree, his homestead was assigned to his daughter, *I. P. Davis,* the respondent, subject to the dower and homestead rights of his widow, Ada G. Johnson. About one year after the death of Charles Johnson his widow remarried.

On January 4, 1920, the house situated upon the homestead was destroyed by fire, in which Ada G. Johnson lost her life, her second husband having predeceased her. Petition for probate of her estate was filed February 2, 1920, and by order of the county court creditors were required to file their claims on or before June 2, 1920, on penalty of having the same barred for failure.

On October 2, 1920, *I. P. Davis,* the daughter, filed a petition in the county court of Shawano county in which the facts already referred to were set out, and it was further alleged that Edith Johnson continued to occupy the premises referred to here as a homestead at the time of her death; that Edith Johnson had the premises insured against loss by fire in the sum of $1,000, which insurance covered the entire premises; that it was the intention of Edith Johnson to insure the said premises as a whole without respect to her particular interest or that of the petitioner. The petitioner prayed "that the insurance money derived from the loss of such building be paid over to your petitioner as the remainderman by the administrator and that said insurance money be not assigned as a part of the estate of Edith Johnson."

Upon the hearing there was testimony to the effect that during the time of the administration of the estate of Charles Johnson an agreement was entered into between the deceased, Ada G. Johnson, and the petitioner, *I. P. Davis,* to the effect that Ada G. Johnson was to continue to occupy the premises rent free, that she was to receive certain personal property at a valuation favorable to her, and that in consid-

eration thereof she was to keep the premises insured. *I. P. Davis* was the step-daughter of Ada G. Johnson, who was the second wife of Charles Johnson. The relations between them were not cordial and might be properly described as unfriendly.

Upon the hearing Ada G. Johnson was variously referred to as Ada G. Johnson and Edith Johnson. In the findings she was described as Edith. The court found the facts as alleged in the petition and in accordance with the evidence introduced at the hearing, and concluded, as a matter of law, that the petitioner was entitled to the sum of $1,000 for the insurance money paid to the administrator on account of the loss of the buildings and that the heirs of Edith Johnson had no interest therein. Judgment was entered accordingly, from which the administrator appeals.

For the appellant there was a brief by *Dillett & Fischer* of Shawano, and oral argument by *C. F. Dillett.*

For the respondent the cause was submitted on the brief of *P. J. Winter* of Shawano.

ROSENBERRY, J. The appellant assigns as error, first, the finding by which the agreement between the respondent and Ada G. Johnson was established, and second, the conclusion of law that the daughter, the petitioner, and respondent here, is entitled to the insurance money. It is further urged on behalf of the appellant that if the claim in question is a valid and proper one it was not filed within the time limited by law and is therefore barred by sec. 3844, Stats.

If the right of the respondent depends upon the contract alleged and found to have been made between the daughter and widow of Charles Johnson, the point of the statute of limitations seems to be well taken. Under such circumstances the liability of the administrator, if any, must be by virtue of a claim against the estate of Ada G. Johnson.

The respondent contends, however, that she is entitled to recover for the reason that it was the duty of Ada G. John-

son, being in possession as the owner of a life estate in the property, to insure the same; that she did insure the property against loss by fire, and that the proceeds of such insurance belong to her as remainderman, or, at best, that the title of the insured was in the nature of a trust for the benefit of the remainderman and funds must be devoted to the restoration of the building.

It is well established that the widow and the heirs are tenants in common until assignment of dower. *Wooster v. Hunts Lyman Iron Co.* 38 Conn. 256; *Montague v. Selb,* 106 Ill. 49; *Knolls v. Barnhart,* 71 N. Y. 474.

Prior to the assignment of her dower a widow has no vested freehold estate. *Farnsworth v. Cole,* 42 Wis. 403; *Howe v. McGivern,* 25 Wis. 525.

The parol agreement between the parties could not affect the nature of the interest which Ada G. Johnson had in the real estate, which was an unassigned and unadmeasured dower interest. Therefore, down to the time of the death of Ada G. Johnson the petitioner and Ada G. Johnson remained tenants in common of the premises. Not being the owner of a life estate, that part of the brief of counsel devoted to the question of the duties and liabilities of a life tenant to the remainderman becomes immaterial.

At the time the contract of insurance was entered into Ada G. Johnson had an insurable interest in the property. The evidence in the case is very meager, but it would appear that the property was indivisible. She had a right, therefore, to one third of the rents and profits of the property during the term of her natural life. Against the loss of the use of the property she had a right to insure. The extent of this interest at the time the contract of insurance was entered into, as well as the extent of her interest at the time when the loss, if any, might accrue, was readily ascertainable under established rules of law. The policy was therefore issued upon the whole property and covered the respective interests of the owners as their interests might appear. She took out the

contract of insurance, and the contract was as to her, therefore, fully performed, and no facts are alleged showing any breach of the contract on her part. Therefore no claim can be made against the estate by reason of the contract into which she entered, which results in the conclusion that there was no need to file a claim. The administrator having received the money, the proceeding is one to establish the interest of the respective parties to the fund. On behalf of the appellant it was contended that the county court had no jurisdiction to entertain such a proceeding.

"Sec. 2443. The jurisdiction of the county court shall extend to . . . all matters relating to the settlement of the estates of such deceased persons and of such minors."

Manifestly the estate in this case could not be settled until the title to the fund in his hands was ascertained. It came rightfully into his possession as administrator. It is an action to charge him as trustee with a fund rightfully in his possession as administrator of the estate of the deceased. We think within the doctrine of *Wisdom v. Wisdom,* 155 Wis. 434, 145 N. W. 126, the county court was authorized to take jurisdiction of this proceeding. Whether or not its jurisdiction was exclusive we do not determine.

The thing insured against, so far as the deceased was concerned, was a loss of her interest in the property. That of necessity must be measured by the extent of her interest in the property at the time the loss accrues. In this case, she having died in the fire which destroyed the premises, she had, when the loss accrued, no interest. The entire fund, therefore, belonged to the respondent, *I. P. Davis.*

By the Court.—Judgment affirmed.

STATE EX REL. SMITH, Appellant, vs. COUNTY BOARD OF OUTAGAMIE COUNTY, Respondent.

September 20—November 15, 1921.

Courts: Special municipal courts: Creation by county board: Rescission of action: Sufficiency of resolution: Good faith of county board: Presumption: Constitutional law: Presumption of validity of statute: Delegation of legislative power: Judges: Change of compensation during term.

1. Under sec. 2523—2, Stats., authorizing the county board of supervisors of any county to adopt the provisions of secs. 2523—1 to 2523—21, inclusive, and to provide for a special municipal court or courts as provided therein, and by resolution at any time thereafter to rescind its action and abolish the same, it was competent for a county board to adopt the statute, determine the place or places where the judge should hold his office, and provide suitable quarters therefor; and its action in adopting the statute by resolution, and by a further resolution providing for a special municipal court to be held in certain named places in the county, was authorized. The statute was a valid enactment although operative only after a resolution adopting it. *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634.
2. Said sec. 2523—2 does not, so far as it authorizes the county board to rescind its action, unconstitutionally delegate legislative power to the board, notwithstanding sec. 2, art. VII, Const., relative to the establishment of inferior courts, since the question of rescinding such action involves a question of fact whether the court is any longer necessary.
3. The legislature cannot delegate its general power to legislate, conferred by the constitution, but it may authorize many things to be done by others which it might properly do itself if it were practicable.
4. The validity of a statute must be presumed until the violation of the constitution is shown beyond reasonable doubt, especially where to hold the statute unconstitutional would cast serious doubt on numerous other statutes.
5. A resolution declaring that the members of the county board were in favor of abolishing the court theretofore established, and directing that no county order be drawn or paid for any salary or other expense in connection with the court, sufficiently indicated an intention to rescind the former action of the board in adopting the statute.

6. It was within the discretion of the county board to rescind its action in adopting the statute providing for special municipal courts, and it cannot be presumed that the members of the board acted in bad faith.
7. Sec. 26, art. IV, Const., providing that the compensation of public officers shall not be increased or diminished during their term of office, has no application to the action of a county board of supervisors in rescinding its previous action adopting the statute providing for special municipal courts, as the office of judge of such court is not a constitutional office, but one which may be created and abolished by the legislature at will. Said sec. 26 applies only to officers having a fixed salary from the state.

APPEAL from an order and a judgment of the circuit court for Outagamie county: EDGAR V. WERNER, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *E. C. Smith* of Seymour, and for the respondent on that of *F. V. Heinemann* of Appleton, district attorney.

JONES, J. This is an appeal from an order quashing a writ of *certiorari,* and judgment sustaining action of the county board of supervisors of *Outagamie County.*

The petition alleged that on the 10th of March, 1916, the county board for said county duly adopted the provisions of secs. 2523—1 to 2523—21, inclusive, of the Revised Statutes, and afterward duly provided for a special municipal court for said county, and "designated the said city of Seymour and the villages of Black Creek, Shiocton, and Bear Creek as the place of holding said court," and that on the 4th of April, 1916, petitioner was duly elected judge of said court for four years commencing June 4, 1916; that he duly qualified and had ever since performed the duties of the office; that on December 6, 1917, the county board passed a resolution abolishing said court and instructed the county clerk that no more county orders be drawn or payments made for salary or expense; and that the county board has since refused to pay the salary. Petitioner alleges that the

said action of the county board was unconstitutional and void. The last resolution of the county board was entitled "Resolution to abolish special municipal court." The material parts were:

"Whereas, there is at the present time located in *Outagamie County* what is known as the First Special Municipal Court, created under sections 2523—1, 2523—21, of the Wisconsin Statutes, under an act which provides that county boards may create or abolish such municipal courts; and

"Whereas, no report has been submitted to this board relative to any transaction during the time this court has been in existence; and

"Whereas, from all information available, no county business has been brought before this court at any time since same was established:

"Now, therefore, be it *Resolved,* that we, members of the Outagamie county board of supervisors, in annual session assembled, are in favor of abolishing this court; and

"Be it further *Resolved,* that no county order be drawn or paid for any salary or other expense in connection with this municipal court."

The sections of the statute applicable are as follows:

"Section 2523—1. There is hereby created and established in each county of this state one or more courts, as may be provided for, to be known and designated as special municipal courts and with the powers and jurisdiction as hereafter provided.

"Section 2523—2. The county board of supervisors of any county may, by a majority of all members-elect, adopt the provisions of sections 2523—1 to 2523—21 inclusive, by resolution, and upon such adoption may thereafter, in like manner and upon a like vote, provide for a special municipal court or courts as herein provided, to be known and designated as the First (or other numerical designation) Special Municipal Court of —— County; and by a resolution of said board, adopted by a majority of the members-elect, at any time thereafter rescind its action and abolish the same; and such board shall determine the place or places where the judge of any such court shall hold his office and provide suitable quarters therefor. Such court shall be provided

with an official seal, necessary dockets and records, stationery and blanks."

Sec. 2523—3 provides for the mode of election, the term of office, and prescribes the terms of eligibility. Other sections relate to the jurisdiction and other subjects. The original statute, which went into effect in 1907, did not contain the clause authorizing county boards to rescind their action. This clause was added by amendment in 1909 and before the action of the county board adopting the statute in question. The trial court filed an elaborate opinion and held that it was beyond the power of the legislature to give county boards authority to say in how many different places one court created under the act shall hold court "by giving the county board discretion to determine more than one place where the judge of any such court shall hold his office and create a circuit."

The opinion further stated:

"In this resolution the county board attempted to delegate the power or discretion to the judge elected to determine as to the time and the days when the court shall go to these places designated, and assumed that they had the power to do so. There is but one conclusion, that the act vested in the county boards legislative powers and discretion, and, if so, the law is unconstitutional."

The trial court was of the opinion that if the law should be held constitutional the resolution of the board abolishing the court would be valid. The judgment quashing the writ proceeded on the theory that the county board had the right to abolish the court since the law under which they had acted was unconstitutional and it was their duty to rescind their action.

We are relieved from the necessity of any elaborate discussion of some of the questions involved in this case by the decision in *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 123 N. W. 248. That was also a writ of *certiorari,* brought to review the action of the county board of Sawyer

county in rescinding a former resolution adopting the provisions of the same statute as it then existed. In that case the same resolution both adopted and undertook to create a special municipal court for said county. In the opinion of the court by Mr. Justice BARNES it is said:

"We do not doubt that a valid option law may be passed providing for the creation of municipal courts. But such a law must be complete and perfect in itself, and must become operative upon a vote which simply adopts its terms. Discretion to say what the law shall be after it is adopted, or to what extent it shall be applicable, may not be conferred on the people of a county or on its board of supervisors. It is here left to the discretion of the county board to say whether there shall be two or more courts in a given county. This is a legislative function which we hold cannot be delegated. The board is given not only the option to adopt the law, but the further option to decide upon the number of courts that may be established under it. This cannot be done. *People ex rel. Bolt v. Riordan,* 73 Mich. 508, 41 N. W. 482; *Pueblo Co. Comm'rs v. Smith,* 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465; *State v. Nine Justices,* 90 Tenn. 722, 18 S. W. 393.

"As we view the law, it does create and establish one municipal court in each county of the state, or at least in such counties as had no municipal court when the act was passed. When a county board votes to adopt its provisions, the law creating the single court becomes effective. Certain administrative and perhaps other functions are properly conferred on the county board to enable it to execute and carry the law into effect, such as providing an office for the judge and determining his salary and the places where he shall hold court, and the like. These functions could be conferred on the county board of Sawyer county in a special act creating a municipal court for that county; and we have no doubt can be conferred under a general law. *Ryan v. Outagamie Co.* 80 Wis. 336, 50 N. W. 340; *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551; *Bartlett v. Eau Claire Co.* 112 Wis. 237, 88 N. W. 61. But functions such as these are wide apart from authority to create or legislate a court into existence in the first instance.

"No substantial reason occurs to us why the valid portion

of this law should not be upheld. The legislature had the laudable purpose in mind of passing one general act applicable to the entire state in lieu of enacting a multitude of special acts limited in their application to a single county. The valid portion of the law will no doubt fulfil the requirements of most of the counties of the state, and it is not apparent how the void portion was any condition or compensation for the passage of the valid part. We conclude, therefore, that the act is valid to the extent of creating and establishing one municipal court in each county of the state, and that to such extent only does it become operative when adopted in the manner therein provided."

It was held, however, in that decision that the resolution of the county board was invalid because it violated the plain mandate of the statute requiring that the board should first adopt its provisions by resolution, and by a separate resolution provide for the court and the time and places where it should be held, and make the necessary provisions to put the law into operation. It will be seen that according to that decision it was competent for the county board of *Outagamie County* to adopt the statute and to determine the place or places where the judge should hold his office and provide suitable quarters therefor. When that decision was written the statute contained no clause authorizing county boards to rescind their action, and it was in that state of the statute that the following language was used:

"If the law had been properly adopted and the proper resolution had been passed creating the court, it would be beyond the power of a county board by subsequent resolution to rescind its action, at least in the absence of express legislative authority so to do. To hold otherwise would be equivalent to saying that it might repeal a law of the legislature of the state which had become operative in the particular county. *Northern T. Co. v. Snyder,* 113 Wis. 516, 533, 89 N. W. 460." *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, at p. 641 (123 N. W. 248).

In that decision the court adhered to the familiar rule often declared by this court that "the legislature cannot dele-

gate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

Numerous illustrations could be given where statutes have been passed of which the parties interested are at liberty to avail themselves or not at their option. A familiar example is that of the primary election law, which was to become operative only on the approval of a majority of the electorate. *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 125 N. W. 961. Another was the act making a change to the commission form of government dependent upon a vote of the municipality. See *State ex rel. Bloomer v. Canavan,* 155 Wis. 398, 145 N. W. 44. By sec. 694*a,* Stats. 1898, county boards were authorized to change by resolution the method of compensating sheriffs from the fee system there prescribed by law to the salary system. In *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460, it was held that in the absence of express statutory provision the board had no power to change back after adopting the salary system. It was said that where the law-making power in enacting an option law has intended to give both the power of adoption and rescission, both powers have been expressly given. For many years there remained in our Revised Statutes a provision, sec. 552, that the voters of towns and villages might adopt by election the township system of school government, and that by vote they might abolish it. We have a statute by which county boards by resolution may abolish all distinction between county poor and town, city, and village poor in the county and have the expense of maintaining all the poor therein a county charge, and by a similar vote repeal the resolution. Secs. 49.15, 49.16, Stats. Under most of the state constitutions, when the sale of intoxicating liquors was not entirely prohibited, it has been held that the question of authorizing the sale of liquor within a given locality may be left to the determination of the voters thereof. 12 Corp.

Jur. p. 867. In this state by statute the voters were given the power to vote to prevent the granting of licenses and afterward to reverse such action. Secs. 1565*a*, 1565*b*, Stats. Other instances might be cited where the legislature has enacted statutes long acquiesced in, depending for their execution upon some contingency, as the approval of the people, or boards, or municipal bodies.

Under the decision already quoted it seems clear that the county board had the authority delegated by the legislature to adopt the statute in question, and that in adopting it they had proceeded regularly. The question of more difficulty is whether they had the power to rescind their action. When the board adopted the statute their action involved the exercise of judgment and discretion. When the resolution of acceptance was presented they were called on to consider whether the proper administration of justice in *Outagamie County* required that a new court should be provided for. The statute permitting their action was not mandatory. It is true that it was a complete enactment, but it was left to the county board to determine whether the county should avail itself of the statute. After this determination the county board had the further discretion to determine the place or places where the judge should hold his office, and provide suitable quarters, and determine whether the fees to be taxed should all be paid to the county or retained by the judge, and what his salary should be. Evidently there was a delegation to the county board of important powers apart from the mere adoption of the statute, and except as to the clause authorizing more than one court, which is not here involved, this court has sustained the constitutionality of the act as it existed before the amendment adding the authority to rescind.

When the resolution to rescind was offered there was presented to the board the question of fact whether the situation had so changed that it was no longer necessary to provide for the court. There was also presented the question of fact whether the judge had filed the reports as to fees required

by the statute as a condition of recovering his compensation for his services.

In the interval between the adoption of the first two resolutions and the last, the legislature had enacted a statute depriving the court of all criminal jurisdiction. So far as the record shows, the amount of civil business transacted had been small indeed. The county board evidently came to the conclusion that the office of judge of the special municipal court was little more than a sinecure and that by the express language of the statute they had the right to rescind their former action.

It is claimed by the appellant that in adopting the provisions of the statute the board exhausted the powers delegated by the legislature, and that the legislature had no power under the constitution to delegate the power to rescind the former action. Of course it must be admitted that the legislature cannot divest itself of the general power to legislate which the constitution confers. It cannot delegate its general legislative authority. But the instances already cited show that, while the legislature cannot deprive itself of its proper functions, it may authorize many things to be done by others which it might properly do itself if it was practicable. We are convinced that the right to rescind the resolutions in question was no more an exercise of legislative power than the resolutions themselves. It may be conceded, as intimated in several decisions, that there was no implied power to retreat from the action the board had taken in adopting the provisions of the statute. *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 123 N. W. 248; *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. But we construe these decisions as implying, though they do not decide, that an express delegation of such power would be valid.

Appellant relies on sec. 2, art. VII, of the constitution, which provides that the legislature shall have power to establish inferior courts in the several counties and to provide for the election of judges of municipal courts.

It would hardly be claimed that in establishing such courts

the legislature may not use the agency of the county boards in the several counties. Nor would it be claimed that the legislature divests itself of power to abolish such courts after they are created. There is no language in this article which provides the mode of establishing these courts or the mode of their abolition. We see no good reason why the same method and agency used for their establishment may not be used for their disestablishment where legislative sanction is expressly given.

The power of the legislature over courts of inferior jurisdiction was thus stated by Mr. Justice TAYLOR in *State ex rel. Martin v. Kalb,* 50 Wis. 178, at p. 188 (6 N. W. 557):

"As an inferior court of civil and criminal jurisdiction, it is the creature of the statute and not of the constitution. It was a court which the constitution permitted the legislature to create and did not prevent it from destroying. The legislature had, therefore, plenary power over that court. It could create or destroy it at its pleasure; and this power of creating or destroying these courts at the will of the legislature has never been questioned and has been frequently exercised."

In determining whether the clause of the statute attacked is unconstitutional we must bear in mind the familiar rule of construction that we must presume in favor of its validity until the violation is shown beyond reasonable doubt. There seems special reason for regarding this rule in this case, since to hold the statute unconstitutional would cast serious doubt on numerous statutes where the legislature has delegated to county boards and other bodies the power to act in the performance of important duties and also the right to rescind their action.

It is contended by the appellant that the resolution of December 10, 1917, was inoperative because it did not follow the language of the statute, but merely registered a sentiment favorable to the abolition of the court and instructed the clerk to withhold payment of salary and expenses. The statute does not prescribe the form of the resolution to be

adopted by the board in rescinding its action. It seems clear to us that although the resolution might have been framed in more appropriate language, the clear intention was to rescind the former action of the board. In the case of *Burgess v. Dane Co.* 148 Wis. 427, 134 N. W. 841, in the opinion by Mr. Justice VINJE it was said, page 436:

"Presumably the board intended to comply with the provisions thereof and to make the change as the statute required. Such presumption must prevail unless the language used is wholly inconsistent therewith. In the case of minor deliberative bodies such as county boards, the language of their resolutions will receive a liberal construction in order to effectuate their evident intent. No technical grammatical interpretation will control. *Hark v. Gladwell,* 49 Wis. 172, 5 N. W. 323; *Wis. Cent. R. Co. v. Ashland Co.* 81 Wis. 1, 13, 50 N. W. 937."

It is also urged by the appellant that there was lack of good faith and any legitimate excuse for the action of the county board in passing the resolution. We are convinced that it rested in the discretion of the county board to take such action as they did for the reasons already stated, and that we cannot presume that they acted in bad faith.

The claim is made by appellant that the action of the county board was in violation of sec. 26, art. IV, of the constitution, which provides that the compensation of public officers shall not be increased or diminished during their term of office.

For this proposition cases are cited where the office and term of office are prescribed by the state constitution. But this provision of the constitution does not apply, since the office of judge of the special municipal court is not a constitutional office, but one which may be created and abolished by the legislature at will. *State ex rel. Martin v. Kalb,* 50 Wis. 178, 6 N. W. 557. Moreover, it has also long been held by this court that the clause of the constitution under discussion applies only to officers having a fixed salary from the state. *Milwaukee Co. v. Hackett,* 21 Wis. 613; *Rooney v.*

Milwaukee Co. 40 Wis. 23, 26; *State ex rel. Sommer v. Erickson,* 120 Wis. 435, 98 N. W. 253.

Although our conclusion is based on reasons quite different from those expressed by the trial court, we reach the same result, namely, that the action of the county board rescinding their former action was valid.

By the Court.—Judgment affirmed.

ROSENBERRY, J., dissents.

KRUEGER and another, Appellants, vs. TOPP-STEWART TRACTOR COMPANY and another, Respondents.

September 20—November 15, 1921.

Electricity: Transmission lines: Acquisition of right of way: Compensation to landowner: Damages.

1. A corporation engaged in the business of furnishing power was granted the right, by a good and sufficient conveyance, to construct its transmission line across plaintiffs' farm. It took possession of the right of way, built its line, ever since occupied the same by itself and its grantee, and it has not in any manner repudiated the grant. The plaintiffs received nothing for the grant, and the minds of the parties never met on the consideration therefor. *Held,* under such circumstances the law implies a promise on the part of the corporation to pay what the right granted is reasonably worth.
2. In such case the court will take judicial notice that rights of this kind are not generally the subject of barter and sale so that they have a market value, it being necessary, therefore, to determine the value by evidence other than that of market value, and such evidence should include the same elements of damage as are involved in fixing compensation under condemnation proceedings.

APPEAL from a judgment of the circuit court for Shawano county: EDGAR V. WERNER, Circuit Judge. *Reversed.*

In the fall of 1917 the *Topp-Stewart Tractor Company*

(hereinafter referred to as the *Tractor Company*), owning a power plant in the town of Pella, Shawano county, Wisconsin, and desiring to transmit such power to the city of Clintonville, contemplated the construction of a power line for that purpose. The proposed route of the line crossed the farm of the plaintiffs located in Shawano county. Negotiations were had between the officers of the *Tractor Company* and the plaintiffs with a view of securing a right of way over said farm for the construction of the proposed line. These negotiations were conducted in behalf of the company principally by Dr. Charles Topp, president thereof, and Alexander Stewart, general superintendent. For this purpose numerous interviews occurred, resulting in considerable talk to the effect that, if the power line were built over plaintiffs' farm, both light and power would be available for the farm for substantially the same rates that would be paid by consumers in the city of Clintonville.

It appears pretty plainly that plaintiffs were desirous of securing light and power for their farm and were led to believe, as a result of conferences with Dr. Topp and Mr. Stewart, that there would be no difficulty in securing both light and power from the proposed line, and if the line were built both light and power would be practically available for use on their farm, and that the company would supply them therewith at ordinary commercial rates (which, however, were not specifically agreed upon) without any expense on their part for special apparatus and equipment necessary to deliver such light and power.

As a result of these negotiations plaintiffs, on the 3d day of November, 1917, executed to the *Tractor Company* the grant of a right of way over said farm, in words and figures as follows:

"*Take Notice:* If this paper is signed without payment of price named, it is done at the signer's own risk and the company will not be responsible for any claim for payment thereafter.

"Received of *Topp-Stewart Tractor Company* one dollar, in consideration of which *Emile Krueger* and *Frank Krueger,* of Shawano county, Wisconsin, hereby grant to said corporation, its successors and assigns, the right to construct, operate, and maintain lines for the transmission of electricity, including all the necessary poles and fixtures, upon and across the property described below owned by first parties, and along and across the roads or streets adjoining said property, together with the right to trim any trees along said line necessary to keep the wires free from interference by said trees, to set the necessary guys, anchors, and brace poles, and to attach to trees the necessary guy wires. The lands referred to are described as follows: Part of S. ½ of N. E. ¼, E. ½ of S. E. ¼ sec. 7, N. E. ¼ of N. E. ¼ sec. 18, T. 26, R. 14 E., county of Shawano, Wisconsin.

"Witness the hands and seals of said first parties this 3d day of November, 1917.

(Witnesses.) "EMIL KRUEGER.
"FRANK KRUEGER."

It seems quite clear from the evidence that they were induced to execute this grant by reason of their belief that when the line was built both light and power would be practically available for use on their farm. A further inducement for the execution of the grant appears to be that the representatives of the *Tractor Company* assured them that after the line was built they would induce the town board to lay out a highway along the route of the transmission line. The *Tractor Company* built the line and subsequently sold the same to the defendant *Central Wisconsin Power Company.* Plaintiffs then demanded of the *Central Wisconsin Power Company* that it furnish them with light and power. That company advised them that it had nothing to do with the agreement upon which they predicated their right to light and power, and that the only way they could secure light and power was either to build a line from the power house to their premises and maintain it, or to purchase a 33,000-volt transformer. Mr. Joslyn, president of the *Central Wisconsin Power Company,* testified that "either of these methods

would be a possible method of furnishing the plaintiffs with light and power, but neither would be a practical method. The 33,000-volt transformer would cost about $3,000 and it would cost about $350 to $400 to build the line from the power house to the premises. The latter would be impracticable," he testified, "because should anything go wrong *Mr. Krueger* could not take care of the line himself. Some one from the plant would be needed, and as we only have one man at a time we could not give him current from the plant because we could not take care of the service. It would mean that some one would have to come from the nearest town and the service could not be replaced until some one took care of it for him."

This action was brought by plaintiffs to recover damages for breach of the agreement on the part of the *Tractor Company* to furnish plaintiffs with light and power, and upon the trial evidence was produced tending to show the value of the farm with and without light and power and with and without the presence of the poles of the transmission line across the same. At the conclusion of the plaintiffs' evidence the defendants moved for a nonsuit, which was granted, on the ground, as stated by the court in an opinion, that the negotiations between the parties relative to the furnishing of light and power did not result in a meeting of the minds of the respective parties upon any given proposition; that while, as a result of such conversations, the plaintiffs understood that they were to have light and power at ordinary commercial rates, such was not the understanding of the representatives of the *Tractor Company;* that consequently there never was a meeting of the minds, and that no binding contract was engendered between the parties. Before granting the nonsuit, however, the court granted plaintiffs leave to petition it to convert this action into one for condemnation, holding that the *Tractor Company* had entered upon the premises by consent of the plaintiffs and that they were relegated to their remedy of condemnation. The plaintiffs

refused to so petition the court, whereupon judgment was entered dismissing the complaint. From such judgment plaintiffs bring this appeal.

For the appellants there was a brief by *Eberlein & Larson* of Shawano, and oral argument by *M. G. Eberlein.*

Llewellyn Cole of Clintonville, attorney, and *P. H. Martin* of Green Bay, of counsel, for the respondents.

OWEN, J. In our consideration of this case we start with the proposition that the plaintiffs granted to the *Tractor Company,* by a good and sufficient conveyance for that purpose, the right to build and construct its transmission line over and across their farm. Pursuant thereto it took possession of the right of way, built its line, has ever since occupied the same by itself and its grantee, and has not in any manner repudiated the grant. It is further a conceded fact that nothing was paid to the plaintiffs for such grant unless it be the one dollar recited in the instrument of conveyance.

Plaintiffs contend that they were induced to make this grant by what they insist was an agreement on the part of the *Tractor Company* to render both light and power available to them for use upon their farm at and for the same rates charged their patrons in the city of Clintonville. It appears from the evidence that there were repeated conversations and negotiations between the plaintiffs and representatives of the *Tractor Company* looking towards the securing of this right of way, and that in such negotiations a great deal was said concerning the furnishing of light and power to the plaintiffs when the transmission line should be constructed and concerning the value and advantage that such service would be to the plaintiffs. These conversations, however, fell short of a definite contract and agreement in that respect. While we have no doubt that the contemplated availability of light and power for the use of plaintiffs on their farm together with the laying out of the highway, which the representatives of the *Tractor Company*

assured them could be procured, was the controlling inducement which prompted them to execute the grant of the right of way, nevertheless such representations were in the nature of loose and desultory talk and did not approach the definiteness required to constitute a contract. It appears that there was nothing said by any one as to how the light and power were to be delivered at the farm. We are impressed with the thought that the plaintiffs assumed that they could tap the power line, and we doubt whether either Dr. Topp or Mr. Stewart realized that an expensive transformer or an individual line from the power plant was necessary for that purpose. We conclude, therefore, that the minds of the parties did not meet on the consideration for the grant. This, we take it, was the view of the trial judge. He concluded that there was no meeting of the minds at all, that there was no contract between the parties, and evidently treated the grant as a nullity.

We cannot hold the grant a nullity. The parties to this action do not seek to have it declared a nullity. The plaintiffs certainly executed the grant, Exhibit A, set forth in the statement of facts, and so long as that stands it vests in the *Tractor Company* the right to build and maintain its transmission line across plaintiffs' farm. True, the consideration, or the supposed consideration, has failed. Assuming that under such circumstances the plaintiffs might repudiate the grant and that a court of equity would cancel the same, the fact remains that the plaintiffs have not only failed to repudiate the grant or to ask for a cancellation thereof, but in this action have expressly affirmed the grant. Both parties, therefore, stand upon the grant, and the question is, What are the rights of the plaintiffs under these circumstances?

The plaintiffs have conveyed something of value to the defendants. They were induced so to do in expectation of benefits resulting to them, which have failed. It was not their intention to donate the grant, neither was a donation sought by the *Tractor Company*. The plaintiffs expected to

secure benefits in the nature of service which it transpires is impracticable for the *Tractor Company* or its grantee to furnish, and which they did not agree or bind themselves to furnish. The case, therefore, should be disposed of on the theory that the plaintiffs did expect to secure this service and the defendants did expect to render it, although neither party appreciated the difficulties rendering such service impracticable if not impossible. It is not reasonable to suppose that the *Tractor Company* had intended to supply the necessary transformer or to build an independent line to render this service. In fact it is not at all likely that it would be permitted by the railroad commission to carry out such an agreement even if entered into. On the other hand, it is just as unlikely that the plaintiffs would have executed this grant had they known that in order to secure this service the building of an independent line, with no assurance of necessary repairs, or the purchase of a transformer at a cost of $3,000, would be necessary. So we say that while it was undoubtedly within the contemplation of both parties that this service should be furnished to the plaintiffs, nevertheless their minds did not meet on any specific and definite proposition, in view of what was necessary to furnish the service, that is enforceable at law.

The result is that the defendants have secured something from the plaintiffs which they propose to keep and for which they have paid nothing. They secured a valuable right by virtue of a misunderstanding. The benefits which plaintiffs expected would accrue to them from the building of the line have failed. Under such circumstances the law implies a promise on the part of defendants to pay what the right is reasonably worth. This the plaintiffs should be permitted to recover in the present action. Amendment of the pleadings for that purpose should be allowed if deemed necessary. The amount which they are entitled to recover is the value of the right which they have conveyed. In ordinary cases the value of that right would be the market value. We take judicial

notice of the fact, however, that rights of this kind are not generally the subject of barter and sale so that they have a market value. It will be necessary, therefore, to determine the value by evidence other than that of market value, and such evidence should include the same elements of damage as are involved in fixing compensation under condemnation proceedings. This would seem to work out complete justice. But for the grant in this case the defendants would be driven to the institution of condemnation proceedings in order to acquire title, and the compensation to be paid would be arrived at under well established principles obtaining in such cases. In fact, defendants claim that condemnation is the exclusive remedy of the plaintiffs in this case. They therefore cannot complain if they be required to compensate the plaintiffs for the grant which they have acquired according to the rules obtaining in such cases.

There does not appear to be any privity of contract between the plaintiffs and the defendant *Central Wisconsin Power Company,* and on what theory that company could be held liable to the plaintiffs is not apparent. However, as there must be a new trial, we will not foreclose plaintiffs of an opportunity to show such liability, if any there be. That is a matter which can be disposed of by the trial court upon a new trial.

By the Court.—The judgment appealed from is reversed, and cause remanded with instructions to grant a new trial in accordance with this opinion.

STATE EX REL. SUPERIOR SHIP BUILDING COMPANY, Respondent, vs. BECKLEY, City Clerk, Appellant.

September 21—November 15, 1921.

Taxation: Exemption: Property owned by United States: Vessels under construction: Materials: Title.

Under sub. (1), sec. 1038, Stats., providing that property "owned exclusively by the United States" shall be exempt from taxation, vessels wholly or partially completed and materials used in their construction were not taxable where a ship-building company, engaged to build certain vessels for the United States Shipping Board Emergency Fleet Corporation under contracts which provided that title to the vessels at any stage in construction and of assembled materials should, in so far as the same were paid for, be in the United States, and where, also, advances made on the date of assessment exceeded the amounts wrought into the vessels.

APPEAL from a judgment of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Affirmed.*

Certiorari to the board of review of the city of Superior. The personal property of the *Superior Ship Building Company* at Superior, hereafter, for convenience, called the *Company,* was assessed for the years 1918 and 1919. In 1920 the *Company* filed objections with the board of review to the assessed valuation of its plant and property for that year. Upon December 20, 1920, there was placed upon the assessment roll of the city of Superior by the board of review the following assessment against the *Company:*

"Personal property omitted in the year 1918, $2,297,000.
Personal property omitted in the year 1919, 2,342,000."

It appears from the record that the property had been intentionally omitted from the assessment rolls for the years 1918 and 1919 by reason of a claim made by the *Company* that the title to the property was in the United States and that it was therefore exempt from taxation. The *Company* is a subsidiary of the American Ship Building Company, which owns all of the stock of the *Company.* It appears,

without dispute, that on May 1, 1918, there were under construction in the yards of the *Company* seven vessels numbered 531 to 537 inclusive, and on May 1, 1919, there were under construction in the yards of the *Company* at Superior seven vessels numbered 543 to 549 inclusive. There was included under these vessels all of the material assembled in the yard at the time for their construction. All of the vessels were constructed under contract made by the American Ship Building Company with the United States Shipping Board Emergency Fleet Corporation, hereafter referred to, for convenience, as the Fleet Corporation. The contracts, except as to slight differences in equipment, were substantially the same. The contract for the vessels was assumed by the *Company,* and we will hereafter treat the matter as if the contract had been made directly with the *Company*. The *Company* agreed to construct the vessels according to certain plans and specifications and to deliver the vessels, when completed, afloat at its works at Superior, Wisconsin. Payment was to be made, ten per cent. at the time of the signing of the contract and in ten and five per cent. payments as the work progressed. By the terms of the contract the Corporation, as owner, might exercise very large supervisory powers both as to workmanship, design, purchase of materials, and employment of labor. It was further provided that in the event of the failure of a contractor to carry out the provisions of a contract the Corporation might take possession of the premises and complete the work. By paragraph 5 of the contract it was provided:

"It is agreed that the title to said vessel, either completed or under construction, in so far as it shall have been inspected and approved and paid for by the owner, shall be in the United States of America, and that the title for all materials for the furtherance of work under this contract, however and by whomsoever contracted for or assembled or set up in the ship yard or used in the construction of the work under this contract, shall, so far as paid for by the owner, be in the owner at all times."

It was further agreed that nothing contained in the clause quoted should be construed as a waiver of the right to reject unsatisfactory work or materials, and it was also provided that until the vessel should be completed and accepted by delivery the vessel should be at the risk of the contractor, and in case of damage or destruction should be restored or replaced by the contractor (the *Company*) at its own cost and expense.

The *Company* agreed also to "pay all lawful taxes, if any, upon the materials on hand and the vessel under construction, up to the time the vessel shall have been finally accepted by the owner." By its terms time was of the essence of the contract, and a bonus of $300 per day was to be paid for each and every day gained by the *Company* by advancing the delivery. It is further provided that should the contractor become insolvent, make an assignment, or commit any act of bankruptcy, the owner might forthwith take possession of and complete the work without giving notice to the contractor. Upon the signing of the contract the Corporation instructed the *Company* to purchase certain material in certain places from certain supply houses, and orders were accordingly placed pursuant to the instructions of the district manager of the Fleet Corporation. In many instances the material for the vessels was purchased by the Fleet Corporation and shipped to itself. A force of guards was placed in charge of the premises and representatives of the Fleet Corporation had power to discharge any employee of the *Company* at will. These guards were solely under the direction of the officers of the Fleet Corporation. The flag of the Fleet Corporation was raised every morning and lowered every night during the time that the Fleet Corporation was in possession. The material which was ordered was specified for each vessel, inspected at the point where manufactured, and arrived at the premises of the *Company* with the inspector's mark and the particular vessel for which it was designed indicated. The materials ordered and designed to be incorporated in the various vessels were at all times

under the control of the Fleet Corporation. The rate of wages was that prescribed by the Macy Labor Adjustment Board, and any price paid above a certain scale was to be made a special claim for additional wages by the *Company*. An agent of the Labor Adjustment Board was sent to the yards of the *Company* and instructed the employment managers personally as to their duties. The last vessel was delivered on October 7, 1919. It appears that vessel No. 531 was partially completed and requisitioned by the government, and on May 1, 1918, there had been expended upon her $424,586.51. On the vessels remaining in the yard on May 1, 1918, the following expenses had been incurred and advancements made:

	Expended.	*Advanced.*
No. 531	$424,586 51	$470,750
No. 532	360,819 36	468,000
No. 533	320,223 27	468,000
No. 534	209,491 44	328,500
No. 535	179,964 15	182,500
No. 536	120,397 95	146,000
No. 537	112,313 12	73,000
Total	$1,727,795 80	$2,136,750

The amount advanced in each instance exceeded the amount then wrought into the vessel, including materials on hand designed for the vessel.

On May 1, 1919, there were under construction seven vessels, the total cost of which on that day and the amount advanced appears in the tables below:

	Expended.	*Advanced.*
No. 543	$536,759 29	$648,000
No. 544	466,594 30	656,000
No. 545	460,279 36	574,000
No. 546	441,126 16	492,000
No. 547	366,228 51	410,000
No. 548	281,123 42	369,000
No. 549	259,683 78	164,000
Total	$2,811,794 82	$3,313,000

It appeared, without dispute, that the materials on hand which had been charged against the respective vessels on the dates in question had been inspected, passed, and accepted by the Fleet Corporation and were ready to be built into the vessels. After the vessels were completed there was a formal trial and a certificate of acceptance was issued by the United States. The date of the acceptance of each of the vessels is shown below:

532, July 2, 1918.
533, July 31, 1918.
534, August 26, 1918.
535, September 30, 1918.
536, October 19, 1918.
537, September 14, 1918.
543, May 2, 1919.
544, June 25, 1919.
545, June 23, 1919.
546, August 15, 1919.
547, September 12, 1919.
548, September 30, 1919.
549, October 17, 1919.

It further appears that the bulk of the material was furnished by the United States Steel Corporation and its subsidiaries upon order of the Fleet Corporation.

Upon the trial in the superior court the court was of the opinion that whether the title to the vessels and material was in the Fleet Corporation or in the United States was immaterial; that it was not in the *Company*, and therefore, under the doctrine laid down in *Ashland Co. v. Knight*, 129 Wis. 63, 108 N. W. 208, it was not assessable in 1920 to the *Company*. Judgment was accordingly entered setting aside and vacating the assessment complained of, from which judgment the defendant appeals.

T. L. McIntosh and *R. M. Rieser* of Superior, for the appellant.

For the respondent there was a brief by *Hanitch, Hartley, McPherson & Johnson* of Superior, attorneys, and *Kelley & Cottrell* of Cleveland, Ohio, of counsel; and the cause was argued orally by *C. J. Hartley* and *G. W. Cottrell.*

ROSENBERRY, J. Brief of appellant contains no assignment of errors as required by Rule 10, and after a very brief

statement of facts proceeds at once to the argument of a number of abstract questions. Inasmuch as the controlling question in this case is, In whom was the title to the property in question on the respective dates mentioned? we may assume that the contention of the appellant is that the court erred, as a matter of law, in holding that it was not in the *Company*.

It is contended by appellant that under the provisions of sub. (1), sec. 1038, Stats., the property exempt from taxation is "that owned exclusively by the United States or by this state," and that the property in question was not exclusively that of the United States but that the *Company* had some interest therein. When the facts and circumstances which surrounded the parties at the time these contracts were entered into are considered, the purpose of those provisions of the contract which attempt to pass title to the property and vessels under construction is plain. The interest to be served was a public interest in its widest application. The fate of the whole contest in which the world was then engaged depended upon shipping, and every nation engaged in the war was endeavoring by all possible means to construct in the shortest possible space of time vessels to supply their respective needs. The contract shows that the greatest care was exercised on behalf of the Fleet Corporation and the officers representing the government of the United States to retain at all times complete control over vessel-building operations. If it is possible to use language which is plain and definite passing the title to partially constructed vessels and the materials on the premises designed therefor, it must be conceded that the language of the contract in this case does it. Indeed it is very doubtful if under the terms of the contract the title to any considerable part of the materials wrought into these vessels was ever in the *Company*. The materials were bought under specifications prepared and delivered to the companies fabricating the same directly by the government and paid for, and when delivered under the

terms of the contract the title to this material was undoubtedly in the United States. Under the contract, and in fact, the *Company* had surrendered possession of its own property to the United States government and was little more than an agency employed by the government and the Fleet Corporation to do certain work. In the case of *U. S. v. Ansonia B. & C. Co.* 218 U. S. 452, 31 Sup. Ct. 49, a similar question, although under different circumstances, was presented to the court. It was there held:

"It is undoubtedly true that the mere facts that the vessel is to be paid for in instalments as the work progresses, and to be built under the superintendence of a government inspector, who had power to reject or approve the materials, will not of themselves work the transfer of the title of a vessel to be constructed, in advance of its completion. But it is equally well settled that if the contract is such as to clearly express the intention of the parties that the builder shall sell and the purchaser shall buy the ship before its completion, and at the different stages of its progress, and this purpose is expressed in the words of the contract, it is binding and effectual in law to pass the title."

The fact that the contract contained other clauses relating to insurance, the duty of the *Company* to restore the property in case of destruction by fire, and the payment of valid taxes, if any, does not operate to modify the clear intent of the parties as expressed in the language of the contract relating to the time when the title shall pass.

By the clause of the contract referred to the title to the vessels passed to and was in the United States exclusively. This applies not only to the vessels wholly or partially completed, but to all materials for the furtherance of the work under the contract. It was therefore by law exempt from taxation.

Many other questions are discussed by counsel which we find it unnecessary to consider in the view which we take of this case. It is undisputed that the material was furnished and the vessels constructed under the contract containing the

clause in question, and the exact relationship of the American Ship Building Company to the *Superior Ship Building Company,* or the exact powers and duties of the Fleet Corporation, are immaterial. Under the terms of the contract as executed, the title to the vessels, wholly or partially completed, as well as the material, passed to the United States.

By the Court.—Judgment affirmed.

C. E. ERICKSON COMPANY, Appellant, vs. FARNUM, Respondent.

September 22—November 15, 1921.

Depositions: Inadequacy of address: Receipt by magistrate: Motion to suppress: When made.

1. The fact that depositions for use in a justice's court were addressed to the "Clerk of Justice Court, Rock County, care of" a firm of attorneys, instead of to the magistrate, is not a ground for suppression of the depositions for insufficiency of address, the papers having been delivered to the justice intact.
2. After a case has been called and a jury struck it is too late to move to suppress a deposition for insufficiency of address, under sec. 4091, Stats., requiring all objections to the admissibility of a deposition to be made before entering on the trial and providing that a deposition may be suppressed after the trial is begun for sufficient cause not disclosed in the deposition and accompanying papers, the defects in the address appearing on the face of the papers.

APPEAL from a judgment of the municipal court of Rock county: HARRY L. MAXFIELD, Judge. *Reversed.*

This action was begun in justice's court before Charles H. Lange, a justice of the peace, in the city of Janesville, Rock county. There was a judgment in favor of the plaintiff, from which the defendant appealed to the municipal court of Rock county. The action was brought on for trial on the 4th day of March. The defendant having demanded a jury, the court ordered the drawing of a jury list. After the jury had

been struck, the court stated that it would be impossible to bring in the jurors until the next day. Thereupon counsel for defendant offered a motion to suppress the depositions of Ernest R. Erickson and Miss Clara M. Erickson, which had been taken for use in justice's court upon the stipulation of the parties that said depositions might be taken upon oral interrogatories, said depositions to be used upon the trial of the above entitled action by the said plaintiff. The motion to suppress was based upon an affidavit showing that the depositions, when taken and completed, were not delivered and transmitted by the officer by whom the same were taken to the magistrate, Hon. Charles H. Lange, as required by sec. 4087, Stats. The motion to suppress the depositions was granted, to which the plaintiff excepted, and the cause was submitted to the jury, which found in favor of the defendant. Judgment was entered accordingly, from which the plaintiff appeals.

John Gross, Jr., of Janesville, for the appellant.

For the respondent the cause was submitted on the brief of *J. G. McWilliams,* attorney, and *J. J. Cunningham,* of counsel, both of Janesville.

ROSENBERRY, J. In granting the motion to suppress the depositions the trial court erred for two reasons:

First. It appeared that the depositions, instead of being addressed to Charles H. Lange, were addressed to "Clerk of Justice Court, Rock county, care of Whitehead & Matheson, Attorneys, Janesville, Wis.," and were entitled "Depositions in case of C. E. Erickson v. C. B. Farnum." It appeared satisfactorily that upon receipt of the depositions at the office of Whitehead & Matheson the envelope, without breaking of the seal, was taken and delivered to Charles H. Lange, justice of the peace, in the condition in which it was received, and that the said envelope was thereafter opened by the justice. There is no claim that the depositions were in any way tampered with or defective in any other respect than the address. Under the facts in this case we think the

depositions were sufficiently addressed and that they should not have been suppressed by reason of the insufficiency of address.

Sec. 4091. "All objections to the validity or admissibility of any deposition shall be made before entering on the trial; but any deposition may be suppressed after the trial is begun if any sufficient cause appear which is not disclosed in the deposition and accompanying papers."

Such defect as there was in this case clearly appeared upon the face of the papers, and we think that under the provisions of this statute a motion to suppress on the grounds of misdirection comes too late when it is made after the case is called and a jury struck. *Goodland v. Le Clair*, 78 Wis. 176, 47 N. W. 268; *Wausau B. Co. v. Plumer*, 49 Wis. 118, 5 N. W. 53; Jones, Evidence (2d ed.) p. 816.

The plaintiff contends that the depositions, together with the order and contract, establish the liability of the defendant as a matter of law. We cannot say that the matters contained in the depositions may not be met by evidence on the part of the defendant. We cannot, therefore, order judgment upon the record.

By the Court.—Judgment reversed, and cause remanded for a new trial.

WIESNER and wife, Appellants, vs. JAEGER and others, Respondents.

September 23—November 15, 1921.

Easements: Long continued use of path: Permissive or adverse possession: Presumption: Evidence: Sufficiency.

1. Where an easement of way is claimed because of the mere use by pedestrians for more than twenty years of a well-defined path across the plaintiffs' premises, the mere fact that the user continued for that period did not raise the presumption of adverse hostile user.
2. A permissive user, no matter how long continued, cannot ripen into an easement by prescription.

3. Where the evidence disclosed that for many years there existed a pathway extending from defendants' residence and summer cottages along a lake shore across plaintiffs' property to a general store and amusement grounds, and that defendants, their families, tenants, and guests, without the express consent of the plaintiffs or their predecessors but with their knowledge and acquiescence, were accustomed to use, without asserting a right to do so, the path on pleasure or business, it is *held* that the user of plaintiffs' premises was permissive and not adverse.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The plaintiffs are the owners of an irregularly shaped piece of land on the south shore of Lake Muskego in Waukesha county. On the west it is bounded by a strip of land about twenty feet in width, owned by Mary Wiesner, running from a highway some three or four hundred feet distant from the lake shore to the lake. West of the land of Mary Wiesner is an irregularly shaped piece of land bordering on Lake Muskego, owned by *Samuel Kingston* and known as Kingston's Grove. To the east of plaintiffs' property, between the highway and the lake shore, is a piece of land owned by John Schuett. Upon the Schuett property there have been for many years a hotel, general store, post-office, and public amusement grounds. The property known as Kingston's Grove has been used for many years as a place of residence by the defendant *Samuel Kingston*, and upon it he has constructed a large number of cottages which are rented during the outing season to various parties. It also appears that on the northerly end of the plaintiffs' premises, at points near or contiguous to the lake shore and extending across the plaintiffs' premises following the general contour of the lake shore, there was an embankment or elevation of ground along the top of which there has been for many years a well known and definitely located path used by pedestrians. The plaintiffs' premises were originally the property of one John Ferguson, who died in the year 1882. His estate was

never probated. He left surviving his wife, a daughter, and one son, George Ferguson. The wife and daughter died in the year 1889, leaving George Ferguson the sole owner of the property. He became of age March 29, 1898. In the year 1907 George Ferguson sold the property to Mary Wiesner, from whom the plaintiffs derived their title in 1909.

Upon the trial the court found "that for more than twenty (20) years immediately preceding the commencement of this action, the defendants, their families and guests, the tenants of the cottages in Kingston's Grove and their families and guests, and all other persons desiring to pass from Kingston's Grove to the Schuett property and from the latter to visit the former, or to walk along the lake shore on business or pleasure, walked along and over said path so situated on the plaintiffs' said premises, regularly, uninterruptedly, openly, notoriously, under claim of right and with the knowledge and acquiescence of the several successive owners of said premises." That the plaintiffs claimed the right to obstruct the path and prevent defendants and other persons from walking along or over the path. The court concluded that at the time the action was commenced the plaintiffs had and they now have no legal right or authority to obstruct said path or otherwise prevent the defendants and said other classes of persons from walking along or over the same, and that the defendants, their families and guests, had a prescriptive right to walk along the path and are now entitled to the free and unobstructed use of the path as pedestrians. Judgment was entered accordingly, from which the plaintiffs appeal.

For the appellants there was a brief by *Fawcett & Dutcher,* attorneys, and *Frank J. Lenicheck* and *Arthur E. Lenicheck,* of counsel, all of Milwaukee; and the cause was argued orally by *George C. Dutcher, Frank J. Lenicheck,* and *Arthur E. Lenicheck.*

For the respondents there was a brief by *Connell & Weidner* of Waukesha, and oral argument by *S. A. Connell.*

ROSENBERRY, J. On behalf of the plaintiffs it is contended that the court erred in finding that the defendants and other classes of persons specified in the findings acquired a prescriptive right in the premises in dispute, and further in finding that the plaintiffs had and now have no legal right or authority to obstruct the path or otherwise prevent the defendants and other classes of persons named in the findings from walking along and over the same.

Upon the trial there was no proof of any continued adverse, open, notorious, and hostile possession of the premises by the defendants, and the defendants rely upon the proposition that upon proof of twenty years' user a presumption arises that such user is adverse and hostile to the rights of the owner of the premises and that such presumption has not been overcome by the proof offered on behalf of the plaintiffs, and that the defendants are therefore entitled to the benefit of the judgment as rendered. The undisputed facts are stated as follows by the trial court:

"There is a well-defined and worn path across plaintiffs' premises which is located as shown on defendants' exhibit number '1,' and which path has existed in substantially the same place for fifty years; that this path is the shortest land route between Kingston's Grove, in which there are something like thirty cottages, and the Schuett property, upon which is located a general store, saloon, dance hall, and amusement park, and upon which the postoffice was located until about two years ago. For a period of more than twenty years prior to the commencement of this action this path was used by the defendant *Kingston* and the occupants of the cottages in Kingston's Grove and others in passing to and from the Schuett property and in traveling along the lake; said use of the path was without the express permission of the owners of the plaintiffs' premises, but was known to and acquiesced in by them, and there was no objection made to such use until August, 1918; there was always a free passage from the path on the *Kingston* property through or over the fence between the *Kingston* property and the plaintiffs' premises. At first there was a step that could be used in getting over the fence, then afterwards

there was an opening which was protected by posts so as to prevent cattle from getting through, but permitted people to get through in passing back and forth, and that finally there was a gate. There were signs on the premises at different times warning people to keep off from the premises, to keep off from them, but not so placed as to indicate that the path was not to be used by people traveling over the premises, but rather warning them, in my judgment rather warning them to keep off from the property on the side of the path. . . .

"While the people making use of the path never asked permission to go across the same, nevertheless they were justified in believing and did believe that they had a right to use it for the purpose of traveling thereon. I think that covers the facts."

It appears that at or near the Schuett property there was in an early day a sawmill and that the path along the lake shore has been there for at least fifty years. The plaintiffs' contention is that such use as was made of the path by the defendants and others was permissive, was not hostile, and that therefore the presumption which might arise upon proof of twenty years of open, notorious, hostile possession adverse to the rights of the plaintiffs does not arise. The issue in this case lies in a very narrow compass.

The presumption upon which the defendants rely does not arise unless the user, during the statutory period, is adverse and hostile to the rights of the owner. The mere fact that the user has continued for twenty years does not raise the presumption of adverse, hostile user. The nature of the user, as well as the length of the period over which it is extended, must both be established by evidence. We think the trial court was in error in holding that the proof of this case establishes an adverse, hostile user of the premises. In fact, it appears to be quite clear that such use as the defendants made of the premises was not under claim of right but was permissive. There is nothing in the evidence to show that the defendants, or any of them, ever claimed any right adverse to the plaintiffs, and there was certainly nothing in

the character of the user which could have brought home to the plaintiff notice of the fact that any right was claimed other than a permissive right. The right claimed by the defendants is a private as distinguished from a public right. The presumption does not arise in this case because the use from the beginning is shown to be permissive. There is no hostile entry or other fact established upon which the presumption can rest. The possession of the defendants in this case was neither hostile nor exclusive. In the case of *Pitman v. Hill,* 117 Wis. 318, 94 N. W. 40, the nature of the use of the premises was such as to make it open, continuous, hostile, and exclusive. A user permissive, no matter how long continued, cannot ripen into an easement by prescription. *Kolpack v. Kolpack,* 128 Wis. 169, 107 N. W. 457; *Thoemke v. Fiedler,* 91 Wis. 386, 64 N. W. 1030. See note, cases cited 44 L. R. A. N. S. 89.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment for the plaintiffs in accordance with the prayer of the complaint.

ROWART, Administratrix, Appellant, vs. KEWAUNEE, GREEN BAY & WESTERN RAILROAD COMPANY, Respondent.

October 15—November 15, 1921.

Railroads: Accident at crossing: Automobiles: Contributory negligence of driver: Failure to heed signals: Duty to look before crossing track.

1. In an action against a railroad company for the death of the driver of a taxicab as the result of a collision at a public crossing, where it is shown by undisputed, competent, admissible evidence that the deceased was guilty of a want of ordinary care exceeding a slight want thereof as a matter of law, which proximately contributed to his death, alleged procedural errors will not be considered because they cannot affect the ultimate result of defendant's nonliability.
2. Where the undisputed evidence showed that a switch engine making a flying switch across a street left a signalman to flag the crossing, who stopped the driver of the taxicab, and

after the engine had passed, notwithstanding the signals and shoutings of the signalman, the driver started his taxicab and was struck by the cars following, he was guilty of contributory negligence barring a recovery for his death.

3. The driver having stopped eighty feet from the track while the engine passed, the duty rested upon him to look for cars after again starting up to cross the track, and it was also his duty to look ahead in the direction in which he was driving.

APPEAL from a judgment of the circuit court for Brown county: HENRY GRAASS, Circuit Judge. *Affirmed.*

Action for personal injury which resulted in the death of plaintiff's husband, Victor Rowart, by reason of a collision between his taxi and defendant's cars in the city of Green Bay on the 5th of April, 1917, at about 7 p. m. Quincy street runs north and south and defendant's track runs east and west, intersecting Quincy street at about right angles. The grade of the track is about two and a half or three feet higher than the grade of the street. Just west of the traveled track of Quincy street and parallel to it is the track of the Chicago, Milwaukee & St. Paul Railway Company. On the east side of Quincy street and to the north of defendant's track is a switch connecting defendant's main line with a switch track running east and parallel to the main line on the south of it. On the day of the accident the switching crew had grouped ten cars on the main line about 550 to 600 feet west of Quincy street for the purpose of making a flying switch across the street. Beginning at the east the cars were grouped as follows: Three log flats, five gondolas, and two box cars, the box cars being loaded. The engine left one man, Gallagher, at the switch to throw it and flag the crossing, there being no regular flagman there, and then ran west and coupled onto the cars. One man, Wood, remained on the foot-board of the engine, and another, Russell, rode on the east end of the easterly flat car. All carried lighted lanterns. The engine then ran east, and when about 250 feet from Quincy street the coupling pin between the engine and the cars was pulled by Wood and the engine ran ahead of the cars and across Quincy street. Just about the time the pin

was pulled a second crossing signal was sounded by the engineer. As the engine passed over Quincy street the cars were from 60 to 180 feet west of the street. The deceased, a taxi driver, approached Quincy street from the north, and Gallagher stepped from the switch to the center of the road and signaled him to stop with his lantern. The driver brought the taxi to a stop about eighty feet from the track as the engine passed. After the taxi was stopped Gallagher started to turn around and go back to the switch, when the deceased started up again. Gallagher then turned about, signaled him to stop a second time, and continued to wave his lantern and "holler" till forced to jump out of the way of the taxi, but the deceased proceeded to cross the track and was struck by the cars. Russell on the flat car also "hollered" at the taxi.

The jury found (1) that Victor Rowart came to his death on April 5, 1917, by the automobile which he was driving over the public highway crossing on Quincy street in the city of Green Bay, meeting in collision with the moving flat cars of the defendant company; (2) that such collision was not caused by the defendant company negligently failing to group, arrange, and use cars having serviceable brakes, while making the flying switch over such public highway; (3½) that the defendant company ran its locomotive and cars faster than twelve miles an hour while approaching and within twenty rods of the Quincy-street crossing; (3¾) that such running of locomotive and cars faster than twelve miles an hour was a proximate cause of Victor Rowart's death; (4) that such collision was caused by the defendant company negligently failing to protect the highway crossing as to travelers on Quincy street who were themselves exercising ordinary care, during the movement of making this flying switch across the public highway on Quincy street; (5) that such negligence was a proximate cause of the collision and Victor Rowart's death; (6) that such collision was caused by the defendant company negligently failing to give due warning of the near approach of the cars detached from

and following the engine, while making a flying switch over the public highway; (7) that such negligence was not a proximate cause of Victor Rowart's death; (8) that Gallagher, after the auto started towards the crossing, got within the traveled track and swung his lantern to stop the auto; (9) that a want of ordinary care on the part of Victor Rowart contributed to produce the collision and his death; (9½) that such want of care was greater than a slight want of ordinary care; and (10) damages in the sum of $6,000. The defendant moved for judgment on the verdict dismissing the complaint and for costs, which motion was granted. The plaintiff appealed.

For the appellant there was a brief by *Martin, Martin & Martin* of Green Bay, and oral argument by *P. H. Martin.*

For the respondent there was a brief by *Fairchild, North, Parker & Bie* of Green Bay, and oral argument by *H. O. Fairchild.*

VINJE, J. In actions such as this, where it is shown by undisputed, competent, admissible evidence that the deceased was guilty of a want of ordinary care exceeding a slight want thereof, as a matter of law, which proximately contributed to his death, alleged procedural errors will not be considered because they cannot affect the ultimate result of defendant's nonliability which inevitably follows from the existence of such contributory negligence. Thus it has been held that where defendant's negligence is shown as a matter of law no finding by the jury that it exists is necessary. *Jirachek v. Milwaukee E. R. & L. Co.* 139 Wis. 505, 121 N. W. 326.

It is undisputed that Gallagher signaled the deceased to stop about eighty feet from the crossing, and that he continued to signal him till he was forced to step aside in order not to be run over by the taxi; that Gallagher when so signaling was some distance north of the railroad track and in the middle of the traveled track of the street. Russell, on the

east end of the east car, signaled the deceased to stop, and both Gallagher and Russell shouted so loud that persons inside homes about a block away heard it. The deceased, a man twenty-six years of age with normal hearing and vision, had a clear, unobstructed view of the crossing and of the cars from where he started up the last time and continuously from there up to the track. An arc light was burning at the crossing so that the whole situation was plainly visible.

It was the duty of the deceased to look for cars after starting up the last time when he was eighty feet from the track. *McKinney v. C. & N. W. R. Co.* 87 Wis. 282, 58 N. W. 386; *White v. C. & N. W. R. Co.* 102 Wis. 489, 78 N. W. 585; *Guhl v. Whitcomb,* 109 Wis. 69, 85 N. W. 142; *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148.

Had he done so he could not have failed to see them, for they were in plain view. It was also his duty to look ahead in the direction in which he was driving, and had he done so he would have seen Gallagher signaling him to stop. He must either have been oblivious to his surroundings or else he recklessly disregarded both the lantern signals and the shoutings. In either case he was guilty of the negligence found. *Puhr v. C. & N. W. R. Co.* 171 Wis. 154, 176 N. W. 767. Under the evidence the jury would have erred had they failed to find that deceased was not guilty of a want of ordinary care exceeding a slight want thereof, because it establishes the contributory negligence found as a matter of law.

By the Court.—Judgment affirmed.

WASHBURN-CROSBY COMPANY, Respondent, vs. KUBIAK, Appellant.

October 18—November 15, 1921.

Sales: Anticipatory breach of contract: Remedies of seller: Election: Partially filled order: Rights of buyer: Amendment of pleading.

1. The effect of an expression by the buyer, prior to the time of performance of his contract, of an intention not to perform, is to give the seller an opportunity to then treat the contract as thereby canceled, or to elect to hold and consider the contract still in force and insist upon performance, and thereafter seek the appropriate remedy for either, but there must be an election in some manner of one or the other alternative; and where the seller gives no recognition of the renunciation and ships the goods, he must be held to have thereby waived his right to treat such action by the buyer as an anticipatory breach.
2. Where plaintiff had two inconsistent courses of action, upon choosing one he lost the other; and having brought action to recover the purchase price of the goods shipped, he cannot amend and set up an anticipatory breach of the sales contract prior to the date of the shipment.
3. Under sec. 1684*t*—44, Stats., a purchaser of a carload lot of flour, feed, and 200 bushels of corn had the right to reject the entire shipment where it did not contain the corn.

APPEAL from a judgment of the municipal court of Brown county: N. J. MONAHAN, Judge. *Reversed.*

The plaintiff is a Minnesota corporation alleged to be engaged in the sale of flour, feed, and grain, the defendant a merchant in Anston, Wisconsin.

On September 8, 1920, plaintiff's agent, Stone, obtained a written order from defendant for a carload lot of flour, feed, and 200 bushels of corn. Defendant's testimony is uncontradicted that the corn was a substantial part of the contract. A price was fixed for the flour, but the feed and corn were to be at the market price prevailing at time of shipment, all to be delivered f. o. b. Anston. As a part of the conditions of the sale it was provided that in case of default by the

buyer on his part, then the seller might at its option and without notice (a) either cancel the contract, or (b) "sell for the buyer's account all the goods not delivered, and the buyer shall then pay the seller on demand any loss occurring from such sale and all accrued charges, such sale to be at any time within six months after such refusal or failure of the buyer." The time for shipment or delivery of such goods was fixed for December 1, 1920. From the testimony it is undisputed that under such order the shipper had, if done within the proper time, the right to determine the respective proportions of sacks of ninety-eight pounds or forty-nine pounds each of the flour, there being a difference in the price of fifteen cents more per barrel for the smaller sacks.

On November 4th defendant asked to have the time for shipping extended beyond December 1st. On November 29th defendant again wrote in substance that he was not in a position to receive the order of September 18th and would give shipping instructions in about three or four weeks. This was acknowledged by letter of December 4th indicating an intention of extending the accommodation there asked for and expecting definite instructions for shipments within three weeks.

About December 1st, however, defendant went to the hospital for an operation and was kept there for about ten days. On December 1st his father, who was looking after some of the details of the business in the defendant's absence, signed an order at the request of Stone, which was a duplicate of the order of September 18th except that the time for delivery was extended to January 5, 1921. On December 4th and while still at the hospital, defendant, being informed by his father of the extension order of December 1st, wrote to plaintiff as follows:

"Would advise that you cancel order for carload of flour and feed which I ordered September 18, 1920, from your agent, Mr. Stone. It's useless for you to ship this order, as the past year has been a very poor one for me financially,

having taken a heavy loss on lumber and other material I handle, and as I am financially embarrassed I certainly could not meet payment of this carload. Besides taking a heavy loss this far this season, I am at present at a hospital, was operated on November 30th. I beg you not to ship this order. I thought when I asked for an extension that I could perhaps accept same, but as the flour market has dropped considerably and having lost on all my undertakings this past year.

"I again beg you not to ship same; please do this for me, and when things sort of adjust themselves again, you no doubt can expect future business from me."

No acknowledgment in writing or otherwise was given by the plaintiff to defendant of this letter. On or about the 11th of December the plaintiff shipped a car containing the flour and feed, but not the corn, to defendant at Anston, and sent him an invoice stating thereon shipment to be in accordance with order of December 1st. Nothing was said about the corn. A bill of lading attached to a draft was subsequently presented and the defendant refused to accept the goods or to pay. About the end of December Stone sold the flour and feed to plaintiff's agent at Pulaski, Wisconsin. For the difference between the price so realized and the invoice price, together with items of freight and expense in connection with such sale, plaintiff brought this action against the defendant in January, 1921.

The original complaint omitted any reference to the corn; alleged that the goods were shipped with a draft and bill of lading and that defendant refused to pay; that after defendant refused to accept the goods plaintiff sold them and demanded the difference, as stated above. The answer admitted the making of a contract, refusal to pay, and alleged that the original contract had been canceled and abandoned. This was followed by an amended complaint again referring to the agreement of September and now alleging as to the agreement of December 1st; again alleges shipment pursuant to this new contract; refusal to pay the draft, demand made,

and again of the sale at a price less than that of the invoice, and the same prayer for judgment. It also alleged that the 200 bushels of corn had been omitted in the order of December 1st at the request of the defendant.

Upon the trial no attempt was made to prove that the omission of the corn in the shipment was at the request of defendant, and it appeared without contradiction that such item was stricken from the second order after it had been signed by defendant's father and without consent or direction by defendant or any one on his behalf.

Upon the trial the plaintiff insisted that it was entitled to consider the letter above quoted of December 4th such a denial of the contract by defendant as made an anticipatory breach of the contract upon which plaintiff might proceed under clause (b) above quoted and recover the damages as then sued for, and moved the court for permission to amend its complaint to conform with the proofs, and on that theory. The motion was granted and judgment directed for the plaintiff for substantially the amount claimed. From the judgment so entered defendant has appealed.

Sol. P. Huntington of Green Bay, for the appellant.

For the respondent there was a brief by *Fairchild, North, Parker & Bie* of Green Bay, and oral argument by *Walter T. Bie.*

ESCHWEILER, J. Assuming, but only for the purpose of the present disposition of this case, that the letter of December 4th quoted above indicated such a refusal by defendant to carry out the contract that it might be treated by the plaintiff as an anticipatory breach thereof, yet there is nevertheless lacking an essential element which must exist before plaintiff could be entitled to recover damages upon such theory, it being the one upon which judgment was rendered in the court below. The fact alone that one party to such a contract indicates his intention of not carrying out his part thereof prior to the time of performance is not suf-

ficient to destroy the contract relationship theretofore existing. The effect of such renunciation by the one is to give the other party an opportunity to then treat it as thereby canceled or nevertheless elect to hold and consider the contract still in force and insist upon performance by the one so renouncing, or tender performance on his own part and thereafter seek the appropriate remedy for either. But there must be an election in some manner of one or the other alternative. Where, as in this case, the plaintiff as seller gives no recognition on his own part of the renunciation to the buyer by responding in any way thereto and proceeds, in spite of such repudiation, to ship the goods in alleged compliance with the contract, he must necessarily be held to have thereby waived his right to treat such action by the buyer as an anticipatory breach. *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 495, 103 N. W. 236, 104 N. W. 920; *Kamps & Sacksteder D. Co. v. United D. Co.* 164 Wis. 412, 414, 160 N. W. 271; *Ambler v. Sinaiko,* 168 Wis. 286, 294, 170 N. W. 270; *Rauer's L. & C. Co. v. Harrell Co.* 32 Cal. App. 45, 162 Pac. 125, 133; *Roehm v. Horst,* 178 U. S. 1, 20 Sup. Ct. 780; *Central T. Co. v. Chicago A. Asso.* 240 U. S. 581, 589, 36 Sup. Ct. 412; 5 Page, Contracts (2d ed.) § 2893; Benjamin, Sales (7th ed.) § 568.

The two courses thus open to his option are necessarily so inconsistent that he cannot have both, and having deliberately chosen the one he has lost the other. *Haueter v. Marty,* 156 Wis. 208, 211, 145 N. W. 775; *Indiana L. E. Co. v. Carnithan,* 62 Ind. App. 567, 109 N. E. 851, 855; *Leonard v. Kendall* (Tex.) 190 S. W. 786, 789; 5 Page, Contracts (2d ed.) § 2896; 6 Ruling Case Law, p. 1025.

The effect of the shipment of the carload of flour and feed on December 11th by plaintiff in alleged compliance with the contract of December 1st and its bringing this action to recover for failure by defendant to pay for such shipment cannot, by such a mere change of pleadings as was permitted in the court below, reinstate the rights, if any such plaintiff had,

upon any anticipatory breach by defendant prior to the time of such shipment. Such change as was so permitted by the trial court is not a mere permissible change of pleadings but amounted to a reinstatement of a cause of action heretofore lost.

By the unexplained omission of the 200 bushels of corn in the carload shipment of December 11th the plaintiff came within the provisions of sec. 1684*t*—44, Stats., providing that, where the seller delivers to a buyer a quantity of goods less than those contracted to be sold, the buyer may reject the entire shipment as a noncompliance with the contract. Therefore, upon receiving the invoice showing that the shipment did not contain the corn, and such being the fact, the defendant was justified in rejecting the entire shipment. The rule would be the same independent of such statute. *Newell v. New Holstein C. Co.* 119 Wis. 635, 641, 97 N. W. 487.

The defendant therefore incurred no liability to plaintiff by his refusal to accept and pay for the goods so attempted to be tendered by plaintiff, for this reason rendering it unnecessary to determine whether or not he was also justified in refusing to accept the attempted delivery because shipped prior to the time fixed by the contract and without the defendant having requested such shipment or having had any opportunity to select, under the options given him, as to the sizes of the packages of flour.

It follows from what has been said that the plaintiff has no cause of action whatsoever against the defendant, and judgment should now be rendered in his favor.

By the Court.—Judgment reversed, and the cause remanded with directions to dismiss the complaint.

RICHMOND and another, Appellants, vs. CRETENS, Respondent.

October 18—November 15, 1921.

Sales: Warranty: Adulterated goods: Trial: Issue: Form of verdict: Damages.

1. In an action for damages for breach of warranty because the article sold was adulterated, the question submitted by the court to the jury, viz. "Did the defendant adulterate the potash which he sold to the plaintiffs?" *held* error, the question being whether the potash was in fact adulterated, not whether the defendant adulterated it.
2. The parties having entered into a stipulation on the trial that "there is only one question to be determined by the jury and that is whether the potash sold by the defendant to the plaintiffs was in fact adulterated," *held* no request that a question to that effect be submitted to the jury was necessary, the stipulation being a sufficient request by both parties for the submission of such question.
3. The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from such breach. This is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty, in the absence of special circumstances showing proximate damage of a greater amount.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Reversed.*

In November, 1917, plaintiffs were refiners and handlers of crude potash at Shawano, Wisconsin. The defendant was a manufacturer of crude potash at Phillips, Wisconsin. On the 24th day of that month plaintiffs wrote defendant stating that they were refiners and handlers of first sorts potash in large quantities and asked for the lowest cash price on such product, saying "We have no objection to buying this material on terms of sight draft attached to bill of lading if you will guarantee your potash is of prime quality and not adulterated with salt or any foreign matter." On

November 26th defendant replied to plaintiffs' inquiry, saying "Will sell you crude potash for thirty-five cents f. o. b. Phillips. Answer at once if wanted." There was an oral acceptance of this proposition and, pursuant thereto, defendant shipped plaintiffs 3,037 pounds of potash at the agreed price of thirty-five cents per pound, which was paid by plaintiffs. An analysis of the product sold showed a decided deficiency of potassium hydroxide and an excessive proportion of sodium chloride (salt) and potassium sulphate. Unadulterated crude potash contains less than two per cent. salt. It appears that salt cannot be introduced into potash except during the process of manufacture, and that this could be accomplished by putting salt into the ashes or into the product about the time it was to be cooled. Before plaintiffs had received the chemical analysis of the potash purchased from defendant they had proceeded to refine it. According to the evidence the refined product was worth but forty cents a pound because of the excessive salt adulteration, whereas if the crude product received from the defendant had been unadulterated the refined product would have been of the value of seventy-five cents a pound. This was the only evidence submitted by plaintiffs as to the damages sustained. There was no evidence to show the market value of the crude product in its pure and in its adulterated state.

The defendant, testifying in his own behalf, denied that he had in any manner adulterated the potash sold by him to plaintiffs and denied as well that he had instructed his employees to introduce salt into the product during the course of manufacture. He also produced one person who was in his employ at the time this potash was manufactured, who testified that he was around the plant about half of the time and that he did not see any salt introduced into the product during the course of manufacture. The defendant did not testify as to how many men he had in his employ, but it appears from the testimony of the employee who did testify that there was at least one other person in defendant's employ at that time. He was not produced as a witness.

At the close of the evidence the parties stipulated that the question of the amount of damages should not be submitted to the jury, but that the question of the measure and amount of damages should be determined by the court. It was further stipulated that "there is only one question to be determined by the jury, and that is whether the potash sold by the defendant to the plaintiffs was in fact adulterated." The question which the court submitted to the jury was this: "Did the defendant adulterate the potash which he sold to the plaintiffs?" The jury answered this question No, and the court rendered judgment on such verdict in favor of the defendant and against the plaintiffs. From the judgment so entered the plaintiffs appealed.

A. M. Andrews of Shawano, for the appellants.

For the respondent there was a brief by *G. R. Empson* of Gladstone, Michigan, and *Olin, Butler, Thomas, Stebbins & Stroud* of Madison, and oral argument by *Byron H. Stebbins.*

OWEN, J. Plaintiffs contend that the question submitted by the court to the jury was not responsive to the issue in the case. They contend that the issue was whether the potash was in fact adulterated and not whether the defendant adulterated it. In their letter of inquiry the plaintiffs said: "We have no objection to buying this material on terms of sight draft attached to bill of lading if you will guarantee your potash is of prime quality and not adulterated with salt or any foreign matter." The price which the defendant quoted plaintiffs was in response to this letter, and must be held to have been in conformity with the terms and conditions mentioned in plaintiffs' letter of inquiry. This amounts to a plain warranty on the part of defendant that the potash so sold was of prime quality and not adulterated with salt or any foreign matter. If the potash furnished was in fact adulterated it amounted to a breach of defendant's warranty regardless of whether he himself did or did not adulterate it. He contracted to furnish potash of a prime and

unadulterated quality. If the product furnished was not of such quality it amounted to a breach of warranty. The question submitted, therefore, did not cover the real issue in the case. The jury might have found that the defendant did not adulterate the product without necessarily finding that the product furnished was unadulterated.

Respondent contends, however, that the question does in fact submit the real issue, in view of the evidence in the case, from which it appears that if the product was adulterated it must have been adulterated in the course of manufacture; that the testimony of the defendant and his employee, produced as a witness, to the effect that the defendant did not adulterate the product while in the course of manufacture, conclusively shows that the product was not, and could not have been, adulterated if such testimony was believed by the jury. This does not necessarily follow. There is nothing to show that the employee who was not produced as a witness did not adulterate the product or that it was not adulterated by some one else. The chemical analysis showed that the potash was adulterated and that the product refined therefrom was of an inferior quality. This is strong evidence that the product was in fact adulterated, to overthrow which every avenue of opportunity to adulterate it should be closed by defendant's evidence. This the evidence produced on the part of defendant failed to do. There was, therefore, room left for the jury to find that the potash was in fact adulterated even though they were satisfied from the evidence that the defendant did not adulterate it. The issue tried called for the submission of the question of whether the potash was in fact adulterated, and the court was in error in limiting the issue to the question of whether the defendant adulterated the potash, as was done by the question which was submitted to the jury.

It is further contended on the part of the respondent that it was the duty of the appellants to specifically request that the proper question be submitted to the jury, and that in the

absence of such request such fact must be deemed to have been determined by the court in conformity with its judgment, and that appellants' neglect or omission to so request amounts to a waiver, and a consent that such omitted fact be determined by the court, by virtue of sec. 2858*m*, Stats., which provides:

"Whenever any special verdict shall be submitted to a jury and there is omitted therefrom some controverted matter of fact not brought to the attention of the trial court by request but essential to sustain the judgment, such matter of fact shall be deemed determined by the court in conformity with its judgment and the neglect or omission to request a finding by the jury on such matter shall be deemed a waiver of jury trial *pro tanto* and a consent that such omitted fact be determined by the court. The finding or determination of such omitted fact by the court may be reviewed on appeal without any exception thereto."

We have the stipulation of the parties entered into at the close of the evidence to the effect "that there is only one question to be determined by the jury, and that is whether the potash sold to the plaintiffs was in fact adulterated," which was a sufficient request not only by the appellants but by respondent that that question be submitted to the jury. It would be most technical, indeed, to require a party, in addition to a stipulation of this kind, to make an additional request that the question so stipulated be submitted to the jury. The action of the court in submitting a different question must be construed as a refusal to submit the question agreed upon.

At the close of the evidence the respondent moved for a nonsuit on the ground that there was no evidence showing that plaintiffs had sustained any damage by reason of the breach of the warranty. It is argued that this motion should have been granted, and that the judgment appealed from should not be reversed even though the issues were not properly submitted to the jury, because in no event are plaintiffs entitled to judgment. This contention is sound if, as a matter

of fact, there is no evidence upon which substantial damages can be predicated. The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from such breach. This is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty, in the absence of special circumstances showing proximate damage of a greater amount. Sec. 1684*t*—69, Stats.

Plaintiffs' letter of inquiry advised the defendant that they were refiners and handlers of first sorts potash. While this did not expressly inform the defendant that this particular potash was desired for refining purposes, it did advise him that the potash was desired either for refining purposes or for the purposes of resale. He knew, therefore, that the product was likely to be refined by the plaintiffs, and that, if so, the refined product would be of a much inferior quality if the crude product was adulterated. Damages resulting from the refining of the product, therefore, were plainly within the contemplation of the parties to the contract of sale, and constituted a proximate result of the breach of the warranty. *Hammond v. Sandwich Mfg. Co.* 146 Wis. 485, 131 N. W. 1097. In this view, the record presents facts which will sustain the assessment of substantial damages.

For the reasons stated the judgment must be reversed, and the cause remanded for a new trial.

By the Court.—So ordered.

JOHN HOFFMANN & SONS COMPANY, Respondent, vs. PARKS, Appellant.

October 18—November 15, 1921.

Limitation of actions: Agreement between parties as to payment on note: Consideration: Effect on limitation: Appeal: Special verdict: Alternative form: Waiver of defect.

1. In an action by an indorsee of a promissory note against the maker, wherein it appeared that the maker had made no direct payment on the indebtedness within the statutory period of limitations, the evidence is *held* to support a finding by the jury that the defendant maker had agreed with the plaintiff indorsee that certain rents due to the indorser be applied on the note.
2. The liability of the maker and indorser upon the note and the mutual agreement of the parties would be ample consideration for the payments.
3. Although the court required the jury to find whether an agreement was made "that the rent checks or some of them" be applied as payments on the note, and a question so framed in the alternative is not ordinarily approved, it is *held* that, since there was no evidence which would indicate that some of the checks were to be so applied and others not, the jury were not misled and no injustice was done.
4. Where a special verdict is objectionable in form, counsel must object and enter due exception to the refusal of the court to correct it.

APPEAL from a judgment of the circuit court for Price county: G. N. RISJORD, Circuit Judge. *Affirmed.*

This is an action by the plaintiff as indorsee against the defendant as maker of a promissory note for $1,500 dated February 14, 1907, payable on demand to F. L. Hunt, and given as part of the purchase money for a stock of goods.

The note matured on August 23, 1911, when the plaintiff demanded payment. The action was commenced July 28, 1919. Defendant denied liability by reason of the statute of limitations, sec. 4222, Stats. Plaintiff contended that the statute was tolled by payments within the six years next preceding the bringing of the action.

The note was indorsed to the plaintiff company in payment of Hunt's indebtedness to it. Until August 14, 1911, defendant paid the interest to plaintiff. On August 23, 1911, after demand, defendant paid $200 on the principal. These were the only payments which he made directly to the plaintiff.

In March, 1912, Mr. Riemer, credit man of the company, by agreement was appointed trustee of the grocery business of defendant and his partner; and thereafter until July, 1918, defendant acted as manager under the direction of the trustee. The business was carried on in a building owned by Hunt, who had a store in the same building, a door connecting the two places of business.

On April 9, 1912, plaintiff sent to Hunt the following letter:

"F. L. Hunt, Phillips, Wis. Milwaukee, April 9, 1912.

"Dear Sir: With reference to the rent due you on the Parks & Waterhouse store: we notice that this will be due and payable on the 12th inst. and will amount to $30. We wish to inquire if it will be agreeable to you to have this rent credited on your indebtedness with us. We make this proposition believing it will be the easiest way for you to pay it off. Will you kindly advise us by return mail, and greatly oblige, Yours very truly,

"JOHN HOFFMANN & SONS CO."

Hunt returned the letter with the following indorsement: "Yes, I intended writing you to do so. Truly yours, F. L. Hunt."

Thereafter on November 30, 1912, in the presence of *Parks,* Hunt indorsed and delivered to plaintiff checks aggregating $135, and this amount was indorsed on the note to the credit of *Parks.* The checks were written by *Parks,* payable to Hunt, and signed by Riemer as trustee. They represented payments for the rental of the store.

Further indorsements of rent checks were made as follows: May 21, 1913, $180; December 30, 1913, $210; December 17, 1914, $70; September 30, 1918, $70. The delivery of all of these checks to Riemer as agent of the plaint-

iff took place in the store of Hunt, generally if not always in the presence of *Parks*.

Riemer testified that all of these payments were made in pursuance of an agreement between *Parks*, Hunt, and himself whereby the rent money due Hunt from *Parks* should be paid by *Parks* to plaintiff and applied on the note, and that *Parks* was to reimburse Hunt to the amount of these payments.

Hunt testified that he did not remember that *Parks* had any part in the agreement as to the application of rents and that there was no express agreement that *Parks* should reimburse him; that he (Hunt) knew that the rent checks were being applied on the note and that he considered that *Parks* was under a moral obligation to reimburse him, and that he hoped to get the money back; that he made the payments because he knew he was liable as an indorser.

Parks denied the agreement, but testified he considered himself under moral obligation to reimburse Hunt. He further testified that he had considered that this note should be taken care of by the trustee and that he was free from liability on it.

The court submitted the following question to the jury: "Did the defendant, *Parks*, agree with Mr. Riemer that the rent checks, or some of them, might be applied by the plaintiff as payments on the note in question?" The answer was "Yes."

Both parties moved for judgment. Judgment was rendered for the plaintiff in the sum of $1,450.54.

For the appellant the cause was submitted on the brief of *W. K. Parkinson* of Phillips.

For the respondent there was a brief by *Barry & Barry* of Phillips, and oral argument by *John S. Barry*.

JONES, J. The principal exception of the defendant's counsel is that the court erred in submitting the special verdict in the alternative.

Passing that subject for the present and assuming that

the error was not fatal, the finding of the jury is based on such evidence that we cannot properly set it aside. Both the defendant and Hunt, the indorser of the note, were undoubtedly liable to the plaintiff. It does not seem inherently unreasonable that there should have been an agreement to apply the payments made by the defendant on this indebtedness. It was conceded by Hunt that this would be the easiest way to pay the indebtedness. If some such arrangement had not been made it would have been natural for the plaintiff to insist upon payment of the note in a manner which might have been more burdensome to both *Parks* and Hunt. The testimony makes it clear that Hunt expected the rent checks to be applied as they were, and throughout the whole period the plaintiff made the application relying on the supposed agreement.

To this agreement Riemer testified very positively. Although Hunt testified that he did not remember that *Parks* was present when it was made, he did not directly deny the agreement, and his whole course of conduct seems to us to corroborate the testimony of Riemer.

There is no rule of law which would prevent the three parties interested from making such an agreement. The liability of the defendant and Hunt upon the note and the mutual agreement of all the parties interested would be ample consideration. *Mainzinger v. Mohr,* 41 Mich. 685, 3 N. W. 183; *Nat. Bank of Delavan v. Cotton,* 53 Wis. 31, 9 N. W. 926.

It is earnestly argued by defendant's counsel that the verdict was fatally defective for uncertainty. It is undoubtedly true that ordinarily a verdict in the alternative is not to be approved, and such verdicts have often been disregarded. Thus where a jury was asked to find whether there was a contract express or implied that defendant should receive compensation for certain services, and an affirmative answer was given, the court said:

"This answer not only leaves it uncertain whether the jury found there was an express or implied contract between the

parties, but we are unable to ascertain whether the jury *agreed* that either contract was made. A part of them may have found there was an express contract, but no implied one; and the others may have reached the conclusion that there was an implied, but no express contract. Thus it is rendered uncertain whether the jury in fact determined this issue. . . . Under these circumstances the question is faulty for duplicity, and is fatally defective for uncertainty as to the determination of the issue." *Lowe v. Ring,* 123 Wis. 370, 375, 101 N. W. 698.

There have been numerous other decisions holding the same general rule.

Does this rule apply in the present case? Although there was considerable testimony as to facts more or less collateral, the whole effort on the part of the plaintiff and defendant during the trial was directed to the question whether or not an agreement was made between the parties regarding the application of the rent checks to the note in question. Riemer testified to a positive agreement at a given time and place that the rent checks should be thus applied. *Parks* denied the agreement. There was no contention by either party that any other agreement was made. On the motion for a new trial the court said:

". . . It was not contended upon the trial that if the plaintiff had a right to apply some checks upon *Parks'* note it had not the right to apply all of them that were released by Hunt."

We consider that the trial court rightly came to the conclusion that if *Parks* agreed that the rent money might be applied as testified to by Riemer, the agreement included all the rent checks that were in fact so applied.

In view of the issues which were tried and the whole course of the trial, we consider that the form of the verdict did not mislead the jury and that there was no testimony from which they could have inferred that some of the payments applied upon the note were included in the agreement and that others were not, and we have come to the conclusion that no injustice was done by the submission of the verdict

in the form it was left to the jury. *Berger v. Abel & Bach Co.* 141 Wis. 321, 124 N. W. 410; *Korn v. Pfister & Vogel L. Co.* 147 Wis. 526, 133 N. W. 586. See *Tosty v. Morgan Co.* 151 Wis. 601, at p. 604 (139 N. W. 402).

Moreover, it does not appear that any exception was taken to the form of the verdict or that the attention of the court was called to it until after the trial or that any other form of question was proposed by defendant's counsel. If the verdict was objectionable in form, counsel should have objected and entered due exception to the refusal of the court to correct it. *Dolphin v. Peacock M. Co.* 155 Wis. 439, 144 N. W. 1112; *Moering v. Falk Co.* 155 Wis. 192, 144 N. W. 207; *Landauer v. Kasik,* 155 Wis. 376, 144 N. W. 974; *Ludvigson v. Superior S. B. Co.* 147 Wis. 34, 132 N. W. 621.

By the Court.—Judgment affirmed.

DONNELLY, Respondent, vs. PACKARD, Appellant.

October 19—November 15, 1921.

Physicians and surgeons: Malpractice in setting broken limb: Evidence: Sufficiency.

In an action against a physician for malpractice, while setting a fracture of the left femur, in not bringing the broken surfaces of the bone together and maintaining them in apposition during the healing period, the evidence is *held* to sustain a finding of the jury that defendant failed to exercise that degree of skill and care ordinarily exercised by physicians in good standing in the locality of his residence, and that such failure was the proximate cause of plaintiff's condition.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of the plaintiff for the sum of $3,764.85 and costs in an action for malpractice.

The plaintiff, a laborer forty-six years of age, while em-

ployed on a road construction job ran his plow against a large boulder in such a manner as to cause an oblique fracture of the upper third of the femur of his left leg.

The issues presented were submitted to a jury upon a special verdict, in which, among other things, the jury answered and found:

1. That the defendant in setting the fracture did not bring the broken surfaces of the bone together and maintain them in apposition during the healing period.

2. That the defendant failed to exercise that degree of skill and care ordinarily exercised by physicians in good standing in the locality of Rhinelander in so treating said fracture.

3. That the failure on the part of the defendant to use skill and care was the proximate cause of the condition of the plaintiff's left thigh at the time of the trial.

4. That one year would have elapsed after the accident before the plaintiff could have resumed his ordinary work in case there had been proper care and treatment.

The jury then fixed plaintiff's damages at the sum of $5,000.

Prior to the commencement of this action the plaintiff had recovered compensation under the workmen's compensation act from his employer, and the jury having found that but for the alleged malpractice the plaintiff would have been able to resume work in twelve months, the defendant was entitled to the benefit of this payment to the extent that the compensation was based upon such malpractice, and the verdict was accordingly reduced by the trial court from $5,000 to $3,764.85.

The defendant's assignments of error are:

1. That the court erred in refusing to direct a verdict for the defendant.

2. That the court erred in refusing to change the answers to the special verdict and to order judgment for the defendant.

3. That the court erred in denying defendant's motion for a new trial.

The determination of this case therefore involves an examination of the evidence in the case for the purpose of ascertaining whether or not there was credible evidence in support of the verdict. A review of the evidence will be found in the opinion.

For the appellant there was a brief by *Lines, Spooner & Quarles* of Milwaukee and *E. D. Minahan* of Rhinelander, and oral argument by *Charles B. Quarles.*

For the respondent there was a brief by *J. & M. Van Hecke* of Merrill, and oral argument by *John Van Hecke.*

DOERFLER, J. Plaintiff testified that the injury occurred on September 26, 1918; that he was taken from his home to St. Mary's Hospital in the city of Rhinelander; where his fractured limb was temporarily placed in a splint by Dr. Meyer of Eagle River. The defendant was thereupon called in to attend the plaintiff, and, according to defendant's testimony, he properly set the fracture in such a manner as to place the fractured surfaces of the broken femur in apposition, as was shortly thereafter demonstrated by an X-ray examination.

Plaintiff also testified that prior to the setting of the bone Dr. Meyer inquired of the defendant whether it would not be a good idea to perform an open operation on the injured limb and upon the two fragments of the bone so as to shorten the bones and the injured limb, and to then re-attach the upper and lower surfaces of the bones by means of a plate and other appliances used in operations of that nature. To this inquiry, according to the plaintiff, the defendant made no reply, and the method suggested was not pursued.

After setting the bone the defendant applied an apparatus known as Buck's extension, the object thereof being to produce a traction on the lower fragment of the limb so as to keep the two injured surfaces in apposition and to prevent

the lower injured surface from slipping up onto and over the injured surface of the upper fragment. The limb itself was placed in a splint, surrounded by bandages.

For some time after the injury the defendant visited the plaintiff in the hospital daily. About ten days after the accident the plaintiff expressed to the defendant his regret that Dr. Meyer's advice with respect to the open operation and the application of a plate had not been followed, and he also inquired of the defendant whether any other method could then be pursued which might result in the shortening of plaintiff's injured limb so as to compensate for a shortening resulting from two prior fractures of the femur in plaintiff's right limb. The plaintiff substantially testified that *Dr. Packard* then said to him that he could take the weight off (meaning the Buck's extension) and let the injured surface of the lower fragment of the bone run up over the injured surface of the upper fragment. The plaintiff also testified that the extension was thereafter removed and that the defendant did nothing thereafter to hold the injured surfaces in proper position, excepting only to put the injured limb into a steel cage known as a pneumatic ambulatory splint, which is made for the purpose of allowing the patient to be moved.

The defendant testified in substance that this splint, by means of bands, is fastened to the limb and to the body, and that the bands are inflated with air so as to constitute a pneumatic cushion, the object of these bands being to hold and maintain the limb in a straight and firm position; that at the bottom of the splint, near the location where the ankle would be placed, there is an apparatus which when applied will produce the necessary traction, producing an effect similar to that brought about by the Buck's extension. Such traction, according to the testimony of the defendant, was applied at the time the plaintiff's limb was placed in this splint. The claim of the defendant that traction was applied when the ambulatory splint was used is expressly denied by

both the plaintiff and his wife, both of whom testified that after the Buck's extension was removed the limb was loosely placed in the ambulatory splint without applying any traction whatsoever.

The defendant in his testimony admits that at or about the time that the Buck's extension was removed there was some talk between the parties about a method to be pursued in order to produce a shortening of the left leg. It is significant also that in the answer of the defendant the following paragraph appears:

"Defendant alleges that prior to the time when the said accident occurred to the plaintiff, the plaintiff had sustained an accident causing a fracture of the femur of the right leg, and that the result of the said accident was that the said right femur united in an overlapping position, causing a considerable shortening of the said right leg, and that when the defendant was employed to attempt to set and heal the said broken femur he was requested by the plaintiff to allow the said femur to shorten, in order to compensate for the shortening in the other leg and make the two legs about equal in length, and that for this reason the said left femur was allowed to unite in such position."

This answer of the defendant was interposed after the application for compensation had been heard and determined by the industrial commission, and after defendant's counsel had received proper information from the defendant with respect to everything that had transpired in connection with the injury and the treatment by the defendant of the injured limb.

The plaintiff further testified that immediately after the removal of the extension the injured surfaces of the bone became very sore, and that he thought he could feel the lower fragment running up the injured surface of the upper fragment.

On or about the 21st of October, 1918, on account of the prevalence of influenza in and around Rhinelander, it was thought advisable by the defendant to have the plaintiff re-

moved from the hospital to his home. The defendant claimed that the Buck's extension was removed about two to three days before the time of plaintiff's removal to his home, and that immediately thereafter the pneumatic ambulatory splint was applied in proper form and was permitted to remain upon plaintiff's injured limb until some time after the beginning of the new year following. The plaintiff was conveyed to his home from the hospital, a distance of about fourteen miles, over rough country roads, in a truck automobile, unaccompanied by either the defendant or by any other physician or a skilled attendant.

The plaintiff claims, and this is substantially undisputed, that for a period of about two weeks after the plaintiff arrived at his home the defendant did not visit him or make an examination of his limb, and that after the lapse of about two weeks the defendant called upon plaintiff and upon examining the limb stated that he ought to have attended to plaintiff's limb before; that the same was in a pretty bad condition. Thereafter the defendant did not visit the plaintiff until on or about the 1st day of January, 1919, at which time the defendant advised plaintiff that he should make use of his limb. Plaintiff attempted to stand on the limb with the aid of crutches, and in the month of March, 1919, attempted to walk with the aid of a crutch and a cane.

As the result of the injury the left limb shows a very marked bow, and the condition of the limb is such as to disable the plaintiff from doing any considerable amount of walking or work and to cause him a great deal of pain, and it is practically undisputed that the condition as so detailed will remain permanent.

On or about the 25th day of March, 1919, prior to the hearing of the application for compensation before the industrial commission, the plaintiff visited Dr. Lemon, a physician and surgeon in the city of Milwaukee, who examined plaintiff's left limb and some X-ray photographs taken of such limb at or about that time, and plaintiff testi-

fied that Dr. Lemon said to him: "What did they try to do to you?" To which the plaintiff answered: "They tried to shorten my leg." Dr. Lemon then said: "That is an awful way to shorten a leg; if they wanted to shorten your leg why didn't they take off the ends of these bones and shove your leg together and give you a square union; then you would have had a solid leg." Plaintiff further claimed that in that conversation with Dr. Lemon the latter criticised *Dr. Packard's* method of treatment. This alleged conversation with Dr. Lemon was denied by him in his testimony.

Dr. R. T. Welch of Rhinelander was called as a witness for the plaintiff, and testified that he had lived there twenty-two years and had practiced his profession since 1895; that he made an examination of plaintiff's limb at the time his application was heard before the industrial commission; that in his opinion the limb could have been shortened with good results, but that in order to do a good job it would have been necessary to have performed the open-surgery operation above referred to; that in the absence of a weight, in an oblique fracture such as the plaintiff had, there occurs a slipping by of the ends of the bones; that the object of the weight is to prevent such slipping; that the leg could be shortened by taking off the weight and letting the parts slip by the way they did, but not with good results; that such a practice was not in accordance with what a physician and surgeon would ordinarily resort to; that the plaintiff's condition will remain permanent; that instead of the broken surfaces having joined, the two fragments of the bone have entirely overlapped and have formed an adhesion on the outer surfaces of the fragments instead of at the injured surfaces. The testimony as to the union of the bones and the condition thereof was based upon an examination of X-ray photographs submitted to the witness. The witness further testified that ordinarily, with proper treatment and with the use of the weight for a sufficient length of time, the

condition found in plaintiff's injured left limb would not have been produced; that the apparent bowing of the left limb is due to the outward displacement of the lower fragment; that at the time of plaintiff's removal from the hospital to his home he should have been attended by some skilled attendant; and that an ordinarily skilled surgeon attending the case would have known that the fragments had passed.

Dr. W. F. Meyer, a witness for the plaintiff, had been an active practitioner for upwards of twelve years and had considerable experience in limb-fracture cases. The witness corroborated plaintiff's testimony as to the conversation between himself and the defendant with respect to the advisability of resorting to the open operation and the use of the plate, etc. He also pronounced the latter method as the practical and ordinary way to shorten a limb injured as was the plaintiff's. He examined the plaintiff's limb immediately after the accident, and the second time about three or four weeks prior to the trial in the lower court. He testified that the X-ray exhibits indicated that the fractured parts of the femur had united along the sides of the bones and not on the broken surfaces. In other words, that the unbroken surfaces of the two fragments are in apposition to one another; that in moving a patient a distance of fourteen miles in the manner in which the plaintiff was moved, the patient should have been attended, and examined when he arrived at his destination, and that the failure to do so was not good practice on the part of the physician. Dr. Meyer also testified that there is no bending of the bones, but that there is a double width of the bone, and that such condition gives the limb the appearance of having been bowed. In all other respects he substantially corroborated the testimony of Dr. Welch. Both Dr. Welch and Dr. Meyer testified that it is not safe, in a fracture like the plaintiff's, to take off the traction until there is a union of the fractured

surfaces, and to have taken it off, as testified to by the plaintiff and his wife, was bad practice from the standpoint of a physician and surgeon.

On rebuttal Dr. Welch testified that with proper treatment ninety per cent. of fractures such as the plaintiff had would result in a serviceable limb. Dr. Meyer, on rebuttal, fixed between eighty per cent. and ninety per cent. as the reasonable recoveries from injuries like the plaintiff's.

For the defense there appeared Dr. Charles H. Lemon, a physician and surgeon of Milwaukee, with a long experience in the treatment of fractures. He testified that upon examination of the X-ray photograph it would appear that there had been an overriding of the bones about three quarters of an inch; that according to the rule established by the American Surgical Association, anywhere between one quarter to one inch in shortening in a fracture of a thigh is considered good surgery. He denied that the X-ray photograph showed a union of the two fractured bones along the sides thereof, but testified that the bones had united at the fractured surfaces. He further testified that the proper use of the pneumatic ambulatory splint is in accordance with the standard practice of the profession. He further pronounced the open operation and the use of the plate as one of the most formidable operations in surgery, which is frequently followed by infection, and he therefore was opposed to such method. In his opinion, after the plaintiff used the limb subsequent to January 1st, it sagged at the point of the fracture and bent because the muscles on the inside of the leg tend to pull the leg towards the inside like the strings of a bow. He pronounced the results achieved by the defendant as a fair average produced by the ordinary, skilful physician, and stated that out of one hundred similar cases treated by physicians forty per cent. would produce results substantially like those in plaintiff's case.

Dr. E. A. Smith, a physician and surgeon of many years of practice and experience and a specialist in X-ray work, substantially corroborated Dr. Lemon's reading of the X-ray

plates in evidence and as to the conditions as they appeared to him as disclosed by such plates. The defendant also, in reading the X-ray photographs, corroborated substantially both Doctors Lemon and Smith.

It appears from the evidence that only one familiar with X-ray examinations and photographs can competently decipher and interpret the same.

It therefore appears from the evidence that there is a sharp conflict in the testimony:

First. As to whether or not traction was removed from the limb before the adhesion of the bones.

Second. As to whether traction was applied when the Buck's extension was removed and the pneumatic ambulatory splint used.

Third. As to whether the bones have united on their sides or whether they have united on the broken surfaces.

Fourth. As to whether the condition found in plaintiff's limb, manifested by the bowing, was due to the adhesion of the bones, as testified to by plaintiff's experts, or whether it is the result of conditions which came about subsequent to January 1, 1919, when plaintiff was advised to and did attempt to resume the use of his injured limb.

If the plaintiff's testimony is to be believed, and we are of the opinion that it is supported by ample credible evidence, then the jury was fully warranted in answering the questions of the special verdict in the manner in which it did. We are also of the opinion that the portion of the answer above set forth is a powerful admission and corroboration of plaintiff's claim, but that independent of such allegations there is ample evidence to sustain the finding of the jury.

The learned circuit judge in his opinion stated that "After much study of the exhibits it still seems to the court that experts might reasonably disagree as to what these exhibits show in this regard, and that there was therefore a jury question presented, and that the jury's finding thereon ought not to be disturbed."

Such opinion of the trial court, as above set forth, meets

with our approval. The outstanding fact remains that the results are most deplorable and that the plaintiff will remain in a crippled condition as herein described for the remainder of his life. There being ample testimony to prove that the defendant failed to exercise that degree of skill and care ordinarily exercised by physicians in good standing in the locality of his residence, and that such failure was the proximate cause of the plaintiff's condition, the judgment of the lower court must be affirmed.

By the Court.—The judgment of the lower court is affirmed.

SCHULTZ and another, Appellants, vs. THREE LAKES DRAINAGE DISTRICT, Respondent.

October 19—November 15, 1921.

Drainage districts: Contract for construction: Performance of unenforceable agreement: Failure to comply with contract: Excuse: Waiver by commissioners: Payments on estimates: Substantial performance.

1. Where contractors engaged in excavating drainage ditches complied with an unenforceable oral agreement with the drainage commissioners to begin excavation at a certain point in the drainage district, they could not thereafter be heard to say that the oral agreement was not binding nor that they were damaged thereby; even though the commissioners insisted upon compliance therewith.
2. That a ditch could not be dug according to specifications by a floating dredge without proper conditions as to water, and that, without fault of the commissioners, there was not at times sufficient water to float the dredge at the necessary height, does not excuse the contractors from compliance with their contract.
3. Although the contract provided that the commissioners might stop the work in case the contractors wilfully refused to comply with its terms, they might also insist on full performance; and payments on monthly estimates, accompanied by protests as to imperfection in the work, do not amount to a waiver of compliance with the specifications.

4. Where the work done has accomplished the essential purpose sought, and the defects are susceptible of remedy so that an allowance out of the contract price will afford full indemnity to the district, the contractors have substantially performed the contract.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

Action to recover damages claimed to have been sustained by the plaintiffs in prosecuting the work of digging ditches in the defendant drainage district because of the acts committed or directions given by the defendant during the progress of the work. The area to be drained sloped generally toward the northeast and the main outlet ditch emptied into Range Line Lake, situated in the northeast corner of the drainage district. The main contentions urged by the plaintiffs upon appeal are that they were compelled to begin the work in the northeast part of the district, thus losing the water behind their dredge unless dams were erected to retain it; that defendant opened a small drainage ditch which existed when they began work, causing loss of water; that a dam in the main outlet ditch was opened; that they were required to dig in such a way that frequent new starts had to be made, requiring the movement of the dredge from one place to another, and that they were not permitted to extend one ditch into Thunder Lake, situated at the southwestern edge of the district, from which lake they claimed they could have obtained an adequate flow of water and the water of which was claimed was to be lowered four feet. The issues will appear from the findings of fact and conclusions of law made by the trial court. They are as follows:

"1. The plaintiffs and defendant duly made, executed, and entered upon the performance of the contract, a copy of which, together with the specifications therein referred to, is annexed to the complaint. In making said contract there was not a complete meeting of the minds of the plaintiffs and the defendant's commissioners in respect to the time of completion of the work. Plaintiffs understood that they

were to have until January 1, 1917, for completion, whereas the commissioners understood that the time fixed was January 1, 1916. By inadvertence the plaintiffs did not observe, before signing the contract, that the date January 1, 1916, had been inserted as the date for completion.

"2. At the time of executing said contract, and in consideration of being awarded the same, the plaintiffs orally agreed with the defendant's commissioners that the plaintiffs would set up their dredge and begin excavating at the east end of the ditch known as Lateral 8, and first excavate Lateral 8 and North and South Main ditches, in order to provide for prompt drainage of the northeastern part of the district, and thus allow of its early improvement and cultivation. Commissioner Clark G. Kuney owned, or had an interest in, and controlled at least three fourths of all the land in the district, including the northeastern portion, and was anxious to begin to demonstrate the desirability of the land when drained.

"3. Plaintiffs proceeded to do the work with a standard floating dredge. Pursuant to aforesaid oral agreement plaintiffs set up their dredge at the east end of Lateral 8 and began excavating on August 30, 1915. After excavating Lateral 8 they turned south on Lateral 1 to reach some needed water, going south nearly to the junction with Lateral 2. They then, at the request of the commissioners, backed up north to the junction with South Main, excavated west on South Main for 4,000 feet, then backed up at the request of the commissioners to the junction with Lateral 8 and excavated north to junction with North Main ditch, then northwest and west on the North Main about one mile, then returned and excavated toward the outlet, stopping just west of the railroad track, at which point a dam, partly natural and partly artificial, was left to retain the water. Then they ran south to the junction with Lateral 2, constructed a dam in Lateral 1 at the north side of their dredge and began excavating westward on Lateral 2, and had proceeded from 600 to 800 feet westward when winter set in and stopped further operations. The course of excavation to this point was taken not because of any arbitrary demand or any exercise of authority on the part of the commissioners, but in accordance with the oral understanding had at the time of the making of the contract and according to re-

quests of the commissioners. Approximately three miles in length of ditches were thus excavated in 1915. Of this portion approximately one half was excavated in reasonable compliance with the plans and specifications, leaving banks with a slope of approximately one to one and a bottom not materially wider than specified. The other half of said portion was not excavated according to plans and specifications in that it was dug with sides much steeper than a one-to-one slope and with bottom much wider than four feet. The failure of compliance with the plans and specifications was due mainly to lack of sufficient water to float the dredge to the necessary height for correct operation. In order to enable the excavation of a ditch of this character so as to leave a narrow bottom and a uniform slope at sides of one to one, it is necessary that the ditch shall be substantially filled with water so as to float the dredge high. In case the dredge is floated low it is necessary to excavate the bottom to sufficient width to allow the passage of the scow, which in this instance was fourteen feet wide, and this results in substantially perpendicular sides.

"4. Plaintiffs arrived at Three Lakes with their dredge equipment in early August, 1915, and it required until August 30th (including some unusual delays) to set up the dredge and other equipment and be prepared for excavation. At the time of arrival there was an abundance of water on the district. About the time of such arrival, or shortly thereafter, Commissioner Aldrich, by direction of Commissioner Kuney, in whose employment Aldrich then was, and against the protests of plaintiffs, opened up a small surface ditch which had existed for some years along the north side of an old road extending east and west across the marsh and lying next north of the line of Lateral 8 and South Main ditches. By means thereof considerable water was drawn from the marsh in the vicinity of Lateral 8 and the east one-half mile of South Main ditch. This, together with a drought in August, 1915, left insufficient water to properly float the plaintiffs' dredge when ready for operation. This draining was done for the private advantage of Commissioner Kuney, but without any wrongful intent, but with sufficient means of knowledge that the same might interfere with the operations of the plaintiffs. The opening of the old ditch by Aldrich materially decreased the amount of water

available and delayed the start and hindered the work of plaintiffs' excavating, to plaintiffs' damage in the sum of $200, and materially contributed to the imperfect excavation of about one and one-fourth miles of ditch, because of lack of water, and therefore the floating low of the dredge. The balance of the imperfectly excavated ditch done in 1915 was so imperfectly excavated solely because plaintiffs failed to build and maintain sufficient dam behind their dredge when they began excavating westward on Lateral 2. The opening of the old ditch by Commissioners Aldrich and Kuney was contrary to their implied obligation as commissioners to avoid interfering with the natural conditions of the marsh, upon which the plaintiffs had a right to rely in making their contract.

"5. In the fall of 1915, in order to enable the commissioners to draw off the water from the northeastern corner of the drainage district from the ditches already excavated in North and South Main and Laterals 1 and 8, it was agreed between the plaintiffs and the commissioners that the plaintiffs would erect a dam, or dams, behind their dredge as the same proceeded south and west, and that this would permit the opening of the outlet toward Range Lake, and that the commissioners would furnish the lumber for the construction of such dams and remove all dams after the use of same had ceased. Some such dams would in any event have been necessary to enable plaintiffs to properly float their dredge. After the construction of a dam by the plaintiffs the commissioners opened the dam leading to the outlet to Range Lake, but by reason of imperfect construction of such dam behind the dredge, and without fault on the part of the commissioners, said dam leaked and washed out and required reconstruction, and caused delay. This hampered the further operation of the dredge and caused the excavation of ditches imperfect in their construction, to the end of the season.

"6. Plaintiffs resumed work on the excavations in the spring of 1916, going west on Lateral 2 and south to a point eighty feet north of Thunder Lake and thereafter proceeded with their work according to their own plans and judgment, finishing and tendering the ditches as completed about October 15, 1917. In so doing plaintiffs excavated 162,000 cubic yards of earth taken from the theoretical prism of the

ditches as shown by the plans and specifications. Said ditches aggregated 11.9 miles in total length. Approximately three miles in length thereof were dug in 1915, five miles in 1916, and four miles in 1917.

"7. After the execution of the contract in question, on June 26, 1915, plaintiffs and the defendant's commissioners agreed to co-operate together to secure the putting in of a sidetrack on the Chicago & Northwestern Railway at or near the east end of Lateral 8 of the district. The commissioners agreed to grade the roadbed therefor and petition the railway company for the laying of the sidetrack, and to otherwise push completion of the same, and the plaintiffs agreed to pay the sum of $125 toward the expense thereof; it being then intended to secure said sidetrack, if possible, in time to enable plaintiffs to have their dredge and other equipment delivered thereon in preparation for unloading and the actual work. Said sidetrack was not secured in time to enable plaintiffs to have their equipment delivered thereon, but was soon thereafter completed and was used throughout their work by plaintiffs in the delivery of coal and other materials. There was no breach of contract in relation thereto on the part of the commissioners.

"8. Of said 11.9 miles of ditches 2.4 miles in length were constructed in fair compliance with the plans and specifications, one and one-fourth miles thereof were imperfect by reason of the drainage off of water by the commissioners in August of 1915, and 8.25 miles thereof were imperfect as to slopes or banks and width of bottom, due to improper handling of their dredge by the plaintiffs. Said nine miles were not excavated to a one-to-one slope on the sides, but with more nearly perpendicular sides. The bottoms thereof were much wider than four feet. There was no fault or interference on the part of the commissioners contributing thereto. Said ditches are not as good as ditches dug according to the plans and specifications because the sides thereof will cave and tend to fill the ditch at its deepest place more quickly, and to obstruct the flow of water more than if said ditches were properly constructed. To make said ditches as good as those specified in the plans and specifications will require that the upper edges, or lips, of each bank should be removed so as to prevent the same from caving, and such portions as have already caved should be removed. The work

of thus remedying the defects may be done to advantage while the district is engaged in cleaning out from the bottoms of the ditches the deposit which the natural and unavoidable action of the elements has placed there. The work of cleaning out and perfecting said ditches could be done at a cost of $700 per mile, one half of which cost would redound to the benefit of the district and one half would be due to the imperfection of said ditches. The defendant district suffered loss and damage, without fault on the part of its commissioners, by reason of the imperfections of said ditches, in the sum of $2,837.50.

"9. Pursuant to the contract the defendant's commissioners and engineer made a monthly estimate of the work done by the plaintiffs and the defendant paid the plaintiffs eighty per cent. of the contract price thereon in accordance with the terms of the contract. Said estimates of quantity of excavation were not made by strict measurement but were approximate only, and were arrived at only by multiplying the length of the ditch excavated by the estimated quantity of earth removed from the theoretical prism of the ditch according to the plans; except that in two instances deductions were made because the ditch was obviously not down to grade. The defendant's commissioners repeatedly protested that the ditches were not being excavated according to the plans and specifications, that the bottoms were too wide and the sides too steep, and that the plaintiffs should comply with the terms of their contract, and at no time did the commissioners accept any portion of the ditches as perfected.

"10. There was no arbitrary, capricious, or bad-faith conduct on the part of the commissioners in their directions to the plaintiffs in the performance of their work.

"11. Plaintiffs leveled the spoil banks along one side of all of said ditches and constructed thereon such roads as were practicable, considering the material for use, all in accordance with the terms of their contract therefor. Said roads are in fair compliance with the plaintiffs' contract. Plaintiffs are entitled, therefore, to their contract price of $100 per mile, and no more.

"12. Defendant has paid to apply upon the contract the sum of $10,320.78, pursuant to estimates made as provided for by contract.

"13. Plaintiffs failed to excavate down to grade a small portion of the ditch at the junction of Laterals 1 and 3, and another small portion at the junction of Laterals 1 and 2, and left wholly unexcavated about fifty feet in length of the North Main ditch at or near the center of section 35, being at the point where the flow of water would naturally separate going east and west. Said unexcavated portions may be done without extra expense in excess of contract price by the defendant when perfecting and cleaning out said ditches. The efficiency of the drainage is not affected by the omission to excavate the small portion left unexcavated in the North Main ditch, and no material advantage would be gained by now excavating same. The unexcavated portions at the other two points might readily be done by hand work, without any large expense. The unexcavated yardage at the three points named has not been included within the 162,000 yards found to have been excavated by the plaintiffs.

"14. Defendant district has not taken any steps to perfect or clean out said ditches. While defendant has been authorized by order of the court in the drainage district proceedings to engage in the laying of a system of auxiliary tile drains opening into said ditches, no work of this kind has been done by the district, and it is problematical when, if ever, said work will be done. There is no evidence on a recoverable basis of any damage suffered by the defendant district by reason of the delay of the plaintiffs in completing excavation of the ditches."

"Conclusions of Law.

"1. Plaintiffs have substantially performed their contract within the terms of the rule regarding substantial performance, and the work done accomplished the essential purpose and the defects are not so essential as to defeat the object of the work, and are susceptible of remedy so that an allowance out of the contract price will give the defendant a full indemnity and give in effect the thing contracted for.

"2. The plaintiffs are entitled to judgment against the defendant according to the following recapitulation:

162,000 cu. yds. excavated at 7.99 cents.....	$12,943 80	
Damages caused by hindrance at beginning.	200 00	
11.9 miles of roads constructed at $100....	1,190 00	$14,333 80

Contra.

Payments made by defendant district.....	$10,320 78	
Damages allowed defendant for imperfections of work.....	2,837 50	13,158 28
Balance		$1,175 52

"Plaintiffs are entitled to recover said balance of $1,175.52, with interest thereon from November 1, 1917."

From a judgment entered accordingly the plaintiffs appealed.

For the appellants there were briefs by *Buell & Lucas,* attorneys, and *Frank W. Hall,* of counsel, all of Madison; and the cause was argued orally by *Mr. Hall* and *Mr. Frank W. Lucas.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

VINJE, J. The trial judge not only heard the evidence but also had a view of the premises. He was therefore in a better position than this court is to determine the facts. His findings of fact disclose a careful and painstaking analysis of the evidence and of the situation and they are sustained by the proof. No question of law not fully settled in the case of *Keachie v. Starkweather D. Dist.* 168 Wis. 298, 170 N. W. 236, is here presented, and we follow and adhere to the law of that case so far as the facts here make it applicable. The opinion of the trial court supplementing his findings discusses the main issues so aptly that we adopt it as our own. It is as follows:

"The court is filing herewith findings of fact and conclusions of law which in the main indicate the court's views upon the questions at issue. No full discussion will be here attempted, but it is desired to mention two or three of the main features.

"It is undisputed that at the time of the making of the contract plaintiffs orally agreed to set up their dredge at

Lateral 8 and to excavate certain ditches in the northern and eastern part of the district first. They were not originally bound by this oral agreement, and had they seen fit to disregard it it could not have been enforced. But assuming this to be true, they nevertheless did proceed to comply with their oral agreement and did set up their dredge and did begin excavating as agreed. Having thus carried out their oral agreement, they cannot be heard to say that it was not binding upon them, nor that they are damaged thereby, even though the commissioners may have insisted upon the plaintiffs doing as they did.

"This disposes of most of the plaintiffs' complaint about being required to dig up-hill. After having once located their starting point it was no doubt impracticable to make another start in the second year. They were, however, at perfect liberty to do so, so far as the evidence shows, and had they chosen to remove their dredge to the south end of Lateral 1 no reason is perceived why they may not have done so.

"After commencement of work in the year 1916 plaintiffs proceeded as directly as possible to get the advantage of the water from Thunder Lake. No reason is perceived why they were not able from that time on to get such water as they needed, assuming a proper handling of their work. Even though the ditch was not extended to Thunder Lake, a very simple contrivance for siphoning water from the lake into the south end of Thunder Lake ditch would have supplied them with all the water they needed, if indeed any were needed other than seepage.

"The profiles show that all of North Main, practically all of South Main, the north half of Lateral 1, and all of Laterals 2, 6, 7, 8, and 10, are strictly level. The outlet having been opened by agreement with plaintiffs during the first season, and it being necessary, therefore, to maintain a dam or dams somewhere in the ditches, and the water of Thunder Lake being available, and it being unavoidable that the plaintiffs should dig up-hill on Laterals 1 and 3, unless they chose to move their dredge to the Rhinelander road, no reason is perceived why their course and direction as they themselves mapped it out in the years 1916 and 1917 was not as good as another that might be adopted in that situa-

tion, and I can see no substantial evidence of any interference by the commissioners that in any way hindered or damaged the plaintiffs in those years.

"In nearly all other respects this case is ruled by decision of *Keachie v. Starkweather D. Dist.* 168 Wis. 298, 170 N. W. 236.

"The fact that the ditch specified could not be dug by a floating dredge without proper conditions as to water, and that the plaintiffs did not at all times have sufficient water therefor, in no manner excuses them from compliance with their contract.

"I see no reason to think that the commissioners waived compliance with the terms of the contract and specifications except in so far as has been found in the findings of fact. The making of monthly estimates, and the payments upon account thereof, taken together with the protests of the commissioners as to the imperfection of the ditches, and the terms of the contract, which are almost identical with those involved in the *Keachie Case,* make it clear that there was no acceptance of the ditches as dug when such monthly estimates and payments were made, and that there was no waiver of imperfections. The commissioners were permitted by the contract, in their discretion, to stop the work, or revoke the contract, or both, in case the plaintiffs wilfully refused to comply with any of its terms and requirements. But the contract did not bind the defendant to take this course. The commissioners might continue to insist on performance in accordance with the terms, and both parties from beginning to end continued to insist on the contract continuing in force and effect.

"I can see no basis in the facts for finding that the contract was at any time set aside or overridden, nor any basis for saying that the plaintiffs are entitled to recover *quantum meruit.*

"The question whether plaintiffs' work amounted in the end to a substantial performance of the contract so as to enable them to recover any sum whatsoever is not an easy one of solution. The supreme court expressed doubt on whether the performance in the *Keachie Case* was a substantial performance. Such performance was very much similar to that complained of here. I think, however, that in this case the fact that the grade of so many of the ditches is

level makes it quite impossible that there can be any material current in them, and therefore there is not likely to be any material cleaning out or scouring by flow. In such case the narrowness of the bottom of the ditch is not so important as in case of ditches with considerable fall. The defects as to sides I think may be readily remedied, and for these reasons I have concluded that the performance was substantial, within the meaning of the rule.

"I think the foregoing observations, together with the findings, express the views of the court."

Little need be added to the above except to state that the evidence sustains the conclusion that it was understood between the parties that Thunder Lake was not to be tapped by plaintiffs; that they had nothing to do with the lowering of the lake and were to dig their ditch only to within eighty feet of it, as the court found, and then stop, though the map of the district shows the ditch apparently running to the shore of the lake just as the outlet ditch runs to the shore of Range Line Lake. But Mr. Kuney, one of the commissioners, testified that the plans did not call for the tapping of Thunder Lake and that the engineer stated positively to plaintiffs that they were to have nothing to do with Thunder Lake.

Since the case presents only questions of fact that have been correctly determined by the trial court, it is not deemed advisable to further discuss the issues because such discussion would be of no value to the legal profession.

By the Court.—Judgment affirmed.

EVAN L. REED MANUFACTURING COMPANY, Appellant, vs. B. HEINEMANN LUMBER COMPANY, Respondent.

October 19—November 15, 1921.

Sales: When payment due: Construction of contract by parties.

A conclusion of law that the phrase "Terms two per cent. fifteen days from date of invoice" on the face of an invoice meant that if payment was not made within fifteen days the whole amount was due, is sustained as a finding of fact upon evidence showing that such was the construction placed upon the phrase by both parties, although among the printed conditions upon the back of the invoice, incorporated by reference into the contract, was one which provided that payment was due in sixty days. JONES, ESCHWEILER, and OWEN, JJ., dissent.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

Breach of contract. On November 17, 1919, the plaintiff and defendant entered into a contract by which the plaintiff agreed to purchase and the defendant agreed to sell 200,000 feet of basswood lumber. The contract contained the usual clauses as to grading, time of shipment, and other matters not material upon this appeal. The contract was written upon an invoice form, and at the top on the face of the invoice there appeared the following: "Terms two per cent. fifteen days from date of invoice."

Upon the margin on the face of the invoice was the following in print:

"Gentlemen: Please accept our thanks for this order, which is taken subject to the conditions on the back thereof, unless otherwise specified.

"Please compare this carefully with your copy and report any corrections promptly.

"Yours truly,
"B. HEINEMANN LUMBER CO."

As a part of the contract which was on the face of the invoice blank the following was typewritten:

"This proposition is written in duplicate, and the ac-

ceptance of same by you, including the conditions on the reverse side of this sheet, unless otherwise specified, is made a part thereof, shall constitute the contract between us.

"B. HEINEMANN LUMBER CO.,
"By W. B. Heinemann,
"Vice-President."

Upon the face of the contract there was the following acceptance:

"Accepted:
"EVAN L. REED MFG. CO.,
"Evan L. Reed, Pres."

On the reverse side of the sheet, among other conditions, was the following:

"The bill for material, not including freight, is payable in sixty days, and is subject to a discount of two per cent. if paid within fifteen days from the date of invoice. If paid after fifteen days and before thirty days, a discount of one per cent. will be allowed, but no discount shall be taken after thirty days from the date of the invoice."

Upon the back or reverse side of the sheet was the following provision:

"The making of payments herein agreed to be made shall be a condition precedent to the purchaser's right to require further performance of this contract, and in case of default in making any payment it is agreed that the seller may, if he so elects, after demanding payment in writing by mail addressed to the purchaser at Sterling, Ill., and such default shall continue five (5) days thereafter, cancel this contract."

On February 14, 1920, the defendant shipped to the plaintiff one carload of lumber at the delivered price of $1,820.96. The defendant claimed that by the terms stated on the face of the contract the amount of the invoice was due fifteen days from the date thereof, which was February 14, 1920. The plaintiff contends that the same did not become due until the expiration of sixty days.

On February 28th the defendant mailed to the plaintiff a statement of account for the amount of $1,820.96, less freight, adding the words "now due."

On March 3d defendant mailed to the plaintiff a duplicate of the same statement with the words added: "Past due. Remit at once to comply with the contract."

On March 4th the plaintiff mailed to defendant a letter acknowledging receipt of the February 28th statement, and saying:

"Note that shipment of February 14th of $1,820.96, less freight, is now due. The freight amounted to $160.05 and we are inclosing the expense bill.

"We had overlooked the fact that you had made this in the contract two per cent. fifteen days."

This was followed by a request by the plaintiff to the defendant to accept the plaintiff's note due in the middle of April. March 8th the defendant replied that it would not accept the note. Thereupon, on March 11th, the plaintiff forwarded to the defendant its check for the amount of the statement less freight and two per cent. discount.

On March 16th defendant acknowledged receipt of the check and returned it, stated that payment should have been made on February 29th, called attention to the special provision of the contract for cancellation in case of default and the fact that default had occurred, and added: "This letter will be your advice that we are canceling our contract with you." Although the plaintiff requested the defendant to make further shipments none were made, and this action was brought to recover damages accruing to the plaintiff by reason of the refusal of the defendant to make further deliveries. There was a judgment in favor of the defendant, from which the plaintiff appeals.

For the appellant the cause was submitted on the briefs of *Regner & Ringle* of Wausau.

For the respondent there was a brief by *Brown, Pradt & Genrich* of Wausau, and oral argument by *L. A. Pradt* and *Fred W. Genrich.*

ROSENBERRY, J. By the terms of the contract the defendant was entitled to cancel it in case there was a default in the

making of any payment after such default should continue five days thereafter. If, as defendant contends, the amount of the first shipment was due February 29th, there was a default which continued for five days after notice and the defendant was within its legal rights in canceling the contract. If the amount of the first shipment was not due until sixty days after date of shipment, as claimed by the plaintiff, the plaintiff is clearly entitled to recover any damages sustained by it by reason of the refusal of the defendant to continue the performance of its contract. The contract says:

"That the condition on the reverse side of the sheet is made a part of the contract unless otherwise specified."

Upon the face of the contract, in typewriting, appears: "Terms two per cent. fifteen days from date of invoice." On the reverse side of the contract, in printing, appears the provision:

"The bill for material, not including freight, is payable in sixty days, and is subject to a discount of two per cent. if paid within fifteen days from the date of invoice. If paid after fifteen days and before thirty days, a discount of one per cent. will be allowed, but no discount shall be taken after thirty days from the date of the invoice."

It is the contention of the plaintiff that the statement appearing upon the face of the contract, "terms two per cent. fifteen days from date of invoice," is merely a repetition of a part of the statement contained upon the back, and that the conditions upon the back control because they are not otherwise specified. The plaintiff further contends that the contract is unambiguous, and that within the doctrine of *Hart v. Hart,* 117 Wis. 639, 94 N. W. 890, evidence cannot be received to explain the contract.

A solution of the question depends entirely upon the meaning of the phrase "two per cent. fifteen days from date of invoice." If this phrase, standing by itself, means that the buyer shall be entitled to two per cent. discount if the bill be paid within fifteen days from date of invoice and that if not paid within fifteen days it shall be due without dis-

count thereafter, as the trial court found, then the terms of sale so specified are certainly other than the terms set out on the reverse side of the contract and so are "otherwise specified." Although this is the pivotal question in the case, no evidence, except the correspondence between the parties, was offered by either party to explain the meaning of this phrase. Shipment was made February 14th. On February 28th the defendant at Wausau sent a bill to the plaintiff at Sterling, Illinois, for the amount less freight, stating thereon, "Now due." In response to this the plaintiff wrote the defendant on March 4th as follows:

"We had overlooked the fact that you had made this in the contract, two per cent. fifteen days. . . .

"We will, of course, pay you in cash if you insist on it, but inasmuch as we will not be able to use the lumber until it is paid for and we ordinarily have sixty days' time, we trust that this will be perfectly satisfactory to you."

In the letter the plaintiff asks the defendant to accept a note for forty-five days.

March 3d the defendant sent the plaintiff a second statement upon which was written, "Past due. Remit at once to comply with contract."

On March 11th the plaintiff wrote the defendant as follows:

"We have yours of March 8th and note that you cannot accept the note that we sent you. We are therefore sending you check less two per cent."

On March 16th the defendant wrote the plaintiff, reciting the terms of the contract, claimed that the invoice was due February 29th, claimed that the plaintiff was in default, and canceled the contract. It was not until after the receipt of defendant's letter canceling the contract that plaintiff set up the claim that the conditions as to terms found upon the reverse side of the contract governed, and throughout the correspondence there is no claim on the part of the plaintiff that the phrase "two per cent. fifteen days from date of invoice"

does not mean that the buyer is entitled to two per cent. if payment is made within fifteen days and that thereafter the bill is due. The contention made by the plaintiff was that the clauses should be construed together and that when so construed there was no inconsistency. We think the circuit judge was clearly right in holding upon the evidence in this case that the phrase "two per cent. fifteen days from date of invoice" meant that if the amount of the invoice was not paid within fifteen days the whole amount was thereafter due. This was the construction placed upon it by both parties. The plaintiff could have had no other meaning in mind when it said in its letter of March 4th: "We had overlooked the fact that you had made this in the contract two per cent. fifteen days. We will pay in cash if you insist." Plaintiff opened negotiations for a modification of the terms, but did not deny that the defendant's claim as to the meaning of the phrase "two per cent. fifteen days from date of invoice" was proper. Whether the statement of the terms on the face of the contract overrode, under the terms of the contract, the provisions upon the reverse side, was a question involving the construction of the contract and a question of law. The plaintiff has never at any time offered any evidence or set up any claim in its correspondence that the meaning of the phrase "two per cent. fifteen days from date of invoice" is other than that found by the trial court. While the finding of the trial court that the phrase meant "that the purchaser is entitled to two per cent. discount on the price if paid within fifteen days, and if not so paid then the full amount becomes due at the expiration of the fifteen days," is found among the conclusions of law, it might more properly have been included among the findings of fact. Although denominated a conclusion of law it will be treated as a conclusion of fact. *Sherman v. Madison Mut. Ins. Co.* 39 Wis. 104. The evidence is ample to sustain the finding. In fact, upon the record as it stands, no other conclusion can be arrived at.

By the Court.—Judgment affirmed.

The following opinion was filed December 13, 1921:

JONES, J. (*dissenting*). It was expressly provided that the conditions on the back of the contract were a part of it. These provisions were clear and explicit, without any ambiguity, and by their terms the payment became due in sixty days. Detailed provisions were made for discounts of different amounts depending on the dates of payment. We cannot agree that this definite and unambiguous language of the contract is changed by the words "two per cent. discount fifteen days from date of invoice." This clause is not necessarily inconsistent with the others. We construe it as merely having the effect of emphasizing the privilege, fully stated in the other clause, of taking the discount if prompt payment should be made.

It was only by taking judicial notice of an alleged custom of trade that the short clause on the face of the contract meant that payment was due in fifteen days that the trial court could reach the conclusion arrived at. Such a custom is asserted by respondent and as confidently denied by appellant. The contract was prepared by respondent, and if there was any ambiguity it should not be construed in its favor. This familiar rule applies with peculiar force when, as here, a construction is urged which operates as a hardship, almost a penalty, to the other party. In view of the definite and unambiguous language in the clause fully expressing the terms of the agreement, I am convinced that if respondent's counsel relied on a custom nullifying such terms it was incumbent on them to prove it.

I do not think that the conclusion of the trial court referred to in the opinion can be treated as a finding of fact in any way controlling our action, for two reasons. In the first place it was not made as a finding of fact; in the second place there was no conflict in the evidence, and the conclusion reached by the court was based wholly on documentary evidence and was properly called a conclusion of law.

It is my view that the contract became binding on both parties when made; that it was definite and certain, and could not be changed to the serious detriment of appellant without its consent. It seems to me very clear that there was nothing in the subsequent correspondence which changed the contract, or which can be regarded as a construction by the parties modifying its plain language.

I am authorized to state that Mr. Justice ESCHWEILER and Mr. Justice OWEN concur in the foregoing dissenting opinion.

KIMBALL-CLARK COMPANY, Appellant, vs. CROSBY, Respondent.

October 19—November 15, 1921.

Sales: Warranty: Affirmation of fact: Reliance by buyer.

1. Defendant, a sawmill operator, inquired of plaintiff the price of his sawmill, to which plaintiff replied that the machinery had been sold but might be repurchased, and that "the necessary belting is all here," and later quoted a price for the mill and machinery which was accepted. *Held,* that under sec. 1684*t*—12, Stats., providing that any affirmation of fact made by the seller tending to induce the purchase is an express warranty, the plaintiff is liable for a shortage in the belting.
2. Plaintiff's letter, after stating that the machinery which had been sold was all in good condition, described the power plant owned by it, referring to boilers, engines, and other equipment, and a subsequent telegram offered the mill and machinery at a designated price "the way it stands." *Held,* that the word "machinery" referred to that which plaintiff was to repurchase and did not include or cover the boilers, and defendant, a man of experience in the business, having examined them, plaintiff is not liable if the boilers were not in usable condition.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

The defendant, engaged in the sawmill business at Rhinelander, Wisconsin, on November 3, 1919, made written in-

quiry of the plaintiff at Kimball, Wisconsin, as to plaintiff's sawmill, asking for a price including the machinery, boilers, etc., and indicating a desire to examine it. On November 4th plaintiff answered, describing in general terms the mill building and continuing as follows:

"With regard to the machinery, it was sold but has never been dismantled and can be bought cheap. The machinery is all in good usable condition and everything that goes with a single circular mill. The power plant consists of two 50-inch x 14 ft., one 60-inch x 14 ft., and one 50-inch x 16 ft. boilers. There is a fine 20-inch x 26 drive slide-valve engine that has ample power to drive the entire mill at one time. There is also two smokestacks, one about 30 inch x 80 feet and the other 40 inch x 80 feet. The necessary belting is all here and the writer would say would be taken at a great saving. If you would consider looking this plant over, it would be advisable to let us know quite promptly as the people who own the machinery may be making plans to wreck it, for all we could say."

On November 6th the defendant telegraphed plaintiff as follows: "Wire price on frame also get me price on machinery today if possible would like to run up on morning train if reply is satisfactory." This was answered the same day by plaintiff by telegram as follows: "Will make price on frame and machinery forty-five hundred the way it stands."

A Mr. Danielson was sent by defendant to examine and report on the condition of the mill, and thereafter on November 12th defendant wrote plaintiff as follows:

"I sent Mr. Danielson up to look at the Kimball mill and he made a report that decides me to go and look at it myself. You may expect me there either Thursday or Friday on the early train and I will look it over and then talk business with you."

The defendant thereafter visited the premises and examined the property. He learned there that such mill had not been operated for seven or eight years. On his visit he was informed, in response to his questions, that inspection certifi-

cates had been given on the boilers. (The testimony shows that such had been done, but at the time when the mill was running.) Although he requested that he might, he did not see the belting that was stored in a shed away from the mill. On November 17th defendant wrote plaintiff with regard to the terms for the payment of the purchase price of $4,500.

The sale was completed and the articles purchased were all shipped to defendant; one of the four boilers was installed and used; three were condemned as unfit for use, and apparently, under the rulings of the industrial commission, were not permitted to be set up in defendant's mill. Subsequently correspondence was had between the parties, but with no reference by defendant as to any claim on his part on account of the boilers. He did complain, however, with reference to the belting and as to an extra nigger-tooth bar.

Subsequently the plaintiff brought this action against defendant for a balance claimed to be due on the sale of certain other goods and merchandise to defendant, and also as a second cause of action for the value of the services of one of plaintiff's employees, claimed to have been rendered at the instance and request of defendant, in dismantling and shipping the mill and machinery.

The defendant answered admitting the liability on plaintiff's first cause of action except as to a small difference; denied liability on the second cause of action, and counterclaimed for damages arising out of the sale of the sawmill building and machinery: first, on the ground that there had been a failure to deliver the necessary belting claimed to have been covered by such contract to an amount of $600; second, that the boilers sold by plaintiff had been condemned and were at the time of sale totally unfit for use, and that the difference between the value of the boilers actually delivered and the value thereof as agreed upon was $833, the damages claimed; and third, that in such sale there had been a failure to deliver a nigger-tooth bar worth the sum of $150. Plaintiff replied.

Upon the trial a special verdict was submitted to the jury by which they found for the plaintiff as to the claim for services (the plaintiff's claim for goods and merchandise being disposed of by agreement), and supported the plaintiff's version of the transaction as to the nigger-tooth bar, finding also that the value of that portion of the belting necessary for the operation of the mill but which was not delivered was $300; that the reasonable value of the four boilers, if they had been in good usable condition at the time of the sale, would have been $1,400; that their value when delivered was $567.

After motions by the respective parties the court granted judgment in favor of the plaintiff for the amounts found or agreed upon as due it, and for the defendant for the $300 for the belting and for the $833 for the deficiency in the value of the boilers, and the balance being in favor of defendant judgment was entered for him. From such judgment the plaintiff has appealed.

A. W. MacLeod of Washburn, for the appellant.

Charles F. Smith, Jr., of Rhinelander, for the respondent.

ESCHWEILER, J. In his submitting a special verdict to the jury and by his subsequent rulings the trial court treated the letter of November 4th, quoted above, as though containing such affirmations of fact concerning the two several items of purchase, the belting and the boilers, as brought the statements of the letter within the terms of sec. 1684*t*—12, Stats., relating to the sale of personal property and providing that any affirmation of fact by the seller relating to the goods is an express warranty if the natural tendency of such affirmation is to induce the buyer to purchase the goods and if he purchases relying thereon, and further held that as such affirmations they were in fact relied upon by defendant in making the purchase.

In view of the statement in that letter, "the necessary belting is all here," the fact that his request to see the belting was not complied with, and the other facts and circumstances in

this case, we do not feel justified in disturbing the conclusion reached by the trial court in regard to that item, and therefore so much of the judgment as allowed the defendant $300 damages because of the undisputed shortage in the belting cannot be now disturbed.

A substantially different situation is presented as to the boilers. As to these the trial court held that from the language in the same letter, "the machinery is all in good usable condition and everything that goes with a single circular mill," although followed as it was by the separate description of the power plant specifically mentioning the four boilers, was nevertheless just such an affirmation of fact as to the boilers and to be followed with the same result as that of the belting. He construed the general term "machinery" in the quoted phrase as including and covering the four boilers though thereafter specifically mentioned, and that such expression so construed amounted to an affirmation that such four boilers were in good usable condition. In this, however, we think the trial court erred.

It appears from the letter of November 4th and from the uncontradicted testimony that the machinery as a part of the mill outfit was separate and distinct from the power plant, which included the boilers and engine. The machinery therein referred to did not belong to plaintiff, and its offer to sell the entire outfit contemplated its repurchasing such machinery. No complaint was or is made but that the machinery so specifically designated and repurchased by plaintiff and delivered to defendant pursuant to contract was in good usable condition just as stated in the letter. Throughout the entire correspondence and transactions the power plant was always treated and mentioned as separate and apart from the machinery. It is to such constantly and consistently separately recognized item of machinery that the expression in the letter as to its usable condition would reasonably and naturally apply, and to that alone, under the testimony here, it should have been confined.

Furthermore, it is quite evident that the defendant did

not at the time of the transaction rely upon anything in the nature of an affirmation with reference to the condition of the boilers or even as to the machinery, and ought not now to be permitted to insist that there was any such reliance. By the telegram of November 6th from plaintiff the defendant is informed that the price for the entire contemplated purchase is $4,500 "as it stands." This is the price upon which the contract is closed. After having such plain notification that the property was, at the price so fixed, to be sold in the condition in which it then stood, he sends his representative to make an examination and follows such examination and report thereon by his own personal investigation of the machinery and the plant as it stood. He was familiar with such matters, having before this made somewhat similar purchases of second-hand mill machinery and materials and erected sawmills therefrom. No fraud or artifice to prevent his making a thorough examination of the boilers and of the machinery is suggested in the record. His opportunity, therefore, to see what there was to be seen about the machinery and boilers was entirely at his own pleasure.

Before the plant was dismantled and shipped it appears that he was notified by his agents dismantling the mill that these boilers were of an obsolete type and of questionable value. Nevertheless he permittd their shipment with the other articles purchased, and during the somewhat protracted subsequent correspondence between the parties with reference to other matters, including the belting, no suggestion is made by defendant that there had been any failure by plaintiff to live up to any alleged representations as to the condition of these boilers. Such contention on his part seems to first appear in the counterclaim in this action. Furthermore, his own evidence as to having made the purchase in any reliance upon representations on plaintiff's behalf as to these boilers is very unsatisfactory and unconvincing and, in view of the other facts in the case, entirely

insufficient to support the conclusion arrived at by the trial court in this particular.

The judgment therefore must be modified by striking out the allowance to the defendant of the sum of $833, which would result in a balance due the plaintiff of $236.54, for which sum, together with interest and the costs of the action, judgment should be entered in the court below.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment as indicated in the opinion.

HATTON, Appellant, vs. FOSNOT, Respondent.

October 19—November 15, 1921.

Game: Public nuisances: Gun not used in unlawful hunting.

A gun is not a public nuisance under sec. 29.03, Stats., and cannot be seized by a conservation warden under sec. 29.05, unless at or about the time of the taking it is being used by the owner or possessor thereof in actual and unlawful hunting; and the gun of a person who, without a license, had started out on a trip to hunt wolves, but had abandoned the trip by reason of a breakdown of an automobile and was returning home through the game country, was not a nuisance, although it was not knocked down and was lying on a blanket unloaded. ROSENBERRY and OWEN, JJ., dissent.

APPEAL from a judgment of the circuit court for Lincoln county: A. H. REID, Circuit Judge. *Reversed.*

This action, commenced in the second municipal court for Lincoln county, is one in replevin for a Winchester rifle of the stated value of $20. The defendant by oral answer asserted that at the time when the property in question was seized by him it was used in violation of ch. 29, Stats., or that he has reason to believe was used in violation of said chapter, and that he seized said property by virtue of the power and authority vested in him as conservation warden. Upon the trial judgment was entered in favor of plaintiff, from

which judgment the defendant appealed to the circuit court. Upon the hearing on appeal in the circuit court the facts were stipulated, and the following statement by the circuit court was accepted by the parties on this appeal as correctly and substantially stating the stipulated facts upon which the case was determined:

"The plaintiff and several others, taking with them dogs and rifles, drove in an automobile from the city of Tomahawk northward into Oneida county, through wild and unsettled lands, for the purpose of conducting a hunt for wolves. They were not possessed of any current hunting license. They passed through many miles of country frequented by game, their automobile became disabled near the point of their destination, and they were delayed for a couple of hours putting the automobile in order, and then, without carrying out the purpose of hunting for wolves, and after engaging in target practice with their rifles, turned about and returned homeward, and while on their way and still in country frequented by game, they were stopped by the defendant as conservation warden, and the plaintiff's rifle, among others, was taken possession of. The rifle was at the time, and had been previously during the trip, transported without being knocked down or inclosed within a carrying case, unless a blanket upon which it lay, and which was in part lapped over it, constituted a carrying case."

In addition to the facts so stated, it also appears from the stipulation that the rifle was at the time mentioned unloaded and not so constructed as to be capable of being knocked down.

The circuit court rendered judgment reversing the judgment of the court below and directing judgment in favor of the defendant. From such judgment the plaintiff has appealed.

For the appellant the cause was submitted on the brief of *G. M. Sheldon* of Tomahawk, attorney, and *John W. Kelley, Jr.*, of Rhinelander, of counsel.

For the respondent there was a brief by *R. T. Reinholdt* of Tomahawk, and oral argument by *Mr. Reinholdt* and *Mr. E. E. Brossard,* assistant attorney general.

ESCHWEILER, J. The defendant as a deputy of the state conservation commission, claiming to act under the authority of sec. 29.05, Stats., giving to such commission and its deputies certain police powers, took from the plaintiff's possession in an automobile on the highway in Oneida county the Winchester rifle belonging to plaintiff.

Defendant's right to so seize and hold the rifle on that occasion is claimed to be warranted on the ground that the rifle was at that time a public nuisance under the provisions of sec. 29.03, Stats., which provides for declaring as public nuisances, among other things, "(6) any boat, together with its machinery, sails, tackle and equipment, or any lamp, light, *gun*, pivot gun, swivel gun, or *other firearm* used in violation of this chapter. . . ." (This provision as well as the others hereinafter cited is found in ch. 29, Stats., entitled "Wild animals, and the regulation of the enjoyment, disposition and conservation thereof.")

The ground upon which that was asserted is the claim that it was, at the time of seizure, being used in a prohibited method of hunting, in violation of the following, the provisions of which, so far as material here, are:

"METHODS OF HUNTING AND FISHING—*General restrictions on hunting.* Section 29.22 (1) *Prohibited methods.* . . . and no person shall carry with him in any vehicle, any gun or rifle unless the same is unloaded, and knocked down or inclosed within a carrying case. . . ."

The specific authority under which the seizure is claimed to be warranted is under the provisions of sub. (7), sec. 29.05, Stats., which reads as follows:

"They [referring to deputies, such as defendant was, of the state conservation commission] shall seize and forthwith confiscate and destroy any apparatus, appliance, or device declared by any provision of this chapter to be a public nuisance; and shall seize and hold subject to the order of the commission, any other apparatus, appliance, or any vehicle, or device, which they shall have reason to believe is being used in violation of this chapter, and if it be proven that the same is, or has been within six months previous to such

seizure, used in violation of this chapter the same shall be confiscated."

The trial court held that upon the stipulated facts and the statutes above quoted the defendant was justified in seizing the gun on the ground that the rifle was not in a knocked-down condition or within a carrying case and was being used in hunting.

We shall dispose of but one of the several questions that are presented by the briefs and arguments in this case.

We agree with the conclusion reached by the trial court that the reasonable construction to be placed upon the provisions of sub. (1), sec. 29.22, quoted above, it containing no express exceptions, is that the language is not to be taken in its strict literal sense, for to do so would necessarily involve a holding that the mere transporting a firearm in any vehicle while such firearm was not in a knocked-down condition or inclosed in a carrying case, however lawful and innocent the purpose might be, would make such firearm a public nuisance and subject to immediate seizure by any deputy of the state conservation commission.

The purpose of this as well as of the other provisions in the same chapter is of course for the regulation of the enjoyment, disposition, and conservation of the wild animals and game of this state, and all its provisions must be construed in connection with such primary purpose of that chapter in view. We are in accord, therefore, with what is said by the court below, that before such an article as is here in question is a public nuisance subject to seizure it must be used in hunting. This is evident also from the express language of sub. (6), sec. 29.03, quoted above, that such article here involved, in order to come within the statutory field of public nuisances, must be "used in violation of this [29] chapter." These and similar statutes involving the seizure, confiscation, or possible destruction of articles such as this, for which there is a lawful as well as the possibility of an unlawful use as distinguished from articles such as

nets, traps, or snares of small intrinsic value and of no practical value except for hunting or fishing, and where the legal process to determine whether such seizure is lawful or unlawful must be resorted to after the seizure instead of where the official makes the seizure pursuant to some writ or process previously obtained, are of a drastic nature and should receive a strict rather than a loose construction. Such distinction as to the different nature of articles within the ban of such statutes is clearly pointed out in such cases as *McConnell v. McKillip,* 71 Neb. 712, 99 N. W. 505, 65 L. R. A. 610, 115 Am. St. Rep. 614; *Lawton v. Steele,* 152 U. S. 133, 140, 14 Sup. Ct. 499.

It is essential, therefore, in order to support the taking by defendant in this particular case, that the fact exist that at or about the time of the taking the firearm was being used by the owner or possessor thereof in actual and unlawful hunting. The use must be actual in order to make it an unlawful use. To become the public nuisance by virtue of such statute and thereby subject to seizure, there must be actual use within the ordinary and reasonable understanding of the term; an intent not carried out or abandoned is not sufficient. Such is the effect of the decisions upon a statute relating to the seizure and destruction of nets and apparatus for fishing under the Michigan law in the case of *Osborn v. Charlevoix Circuit Judge,* 114 Mich. 655, 663, 72 N. W. 982. Under this view we are of the opinion that at the time defendant made the seizure of the rifle then in plaintiff's possession, it was not in actual use in unlawful hunting and therefore was not a public nuisance subject to seizure.

Whatever purpose the plaintiff and his associates may have had to violate the hunting laws in starting out on their wolf-hunting expedition, all such had been entirely abandoned and given up prior to the seizure. The situation here is not such as would be presented in case of a seizure upon a return trip from an unlawful enterprise which had been carried out to the extent of actual hunting, even though no game

had been shot or shot at. But here, before the parties reached the point at which it was proposed to actually begin hunting, they abandoned that purpose—whether from the ethical point of view that it were better not to violate the hunting laws or merely because of the breakdown of their automobile is immaterial. It was as a matter of fact abandoned, and they were now returning not from a hunting trip but from an abandonment of such an enterprise. The gun, therefore, was not when seized a public nuisance under these statutes, and defendant has no legal justification for withholding it.

The question as to the effect of the last clause found in sub. (7), sec. 29.05, quoted above and reading, "and if it be proven that the same is, or has been within six months previous to such seizure, used in violation of this chapter the same shall be confiscated," as well as other questions, we do not consider to be before us on this appeal although discussed in the briefs and arguments, and we therefore express no opinion thereon.

It follows from what has been said that the judgment of the court below must be reversed and judgment entered for the plaintiff.

By the Court.—Judgment reversed, and the cause remanded with directions to enter judgment for plaintiff.

ROSENBERRY, J. (*dissenting*). I find it impossible to concur with the conclusion reached by my brethren in this case. The idea that a man is on a hunting trip when he is going out with the necessary paraphernalia for hunting, and that when he has completed the hunt or abandoned it and is on his way home he is not on a hunting trip, does not appeal to me. The construction placed upon this statute makes the enforcement of the law a practical impossibility, as any one knows who has had any experience either in the enforcement of the law or in its practical application to the conditions as they exist, particularly in the northern part of the state. I con-

cur in the construction placed upon the statute by the trial court.

I am authorized to say that Mr. Justice OWEN concurs in this opinion.

HANSON, Respondent, vs. TEMPLE and another, Appellants.

October 20—November 15, 1921.

Libel: Charging lawyer and assemblyman with opposing prohibition law: Conditional privilege: Express malice: Fair criticism: Demurrer.

1. Upon demurrer thereto, the allegations of a complaint must be taken as true.
2. To charge plaintiff, a lawyer and member of the legislature, in a published article, with "sneering at prohibition enforcement in an outburst which asserts that to get drunk is human and keeping booze from a man is chaining him up," clearly means and implies not only that he is opposed to the enforcement of the Eighteenth amendment to the federal constitution and the Volstead act (41 U. S. Stats. at Large, 405, ch. 85), but that he entertains views contrary to good morals on the subject of intoxication, and is libelous, since as an assemblyman and as a lawyer plaintiff has taken oath to support the law and aid in its enforcement.
3. Such an article is not privileged as offering fair criticism of plaintiff's acts as an assemblyman or as a citizen; and in order to constitute an alleged libelous article conditionally privileged, the publisher of the article must not be actuated by malice.

APPEAL from an order of the circuit court for Juneau county: JAMES WICKHAM, Judge. *Affirmed.*

Action for libel. The facts are stated in the opinion.

For the appellants the cause was submitted on the brief of *McFarlane & Loomis* of Mauston.

For the respondent there was a brief by *Frank H. Hanson in pro. per.* and *John B. Miller,* attorney, both of Mauston, and oral argument by *Mr. Hanson.*

DOERFLER, J. This action is brought by the plaintiff against the defendants for the recovery of damages for publication of an alleged libelous article. The complaint, among other things, alleges the following:

"That at the times hereinafter mentioned the plaintiff was a lawyer practicing his profession at the city of Mauston, in the county of Juneau, state of Wisconsin, and was of good name and credit as such lawyer, and further that at such times plaintiff was the duly elected and qualified member of assembly of the county of Juneau, in the state of Wisconsin, and was performing the duties of said office, the legislature of Wisconsin being then in regular session.

"That at said times, and particularly on the 3d day of February, 1921, the defendants were the publishers and proprietors of Juneau County Chronicle, a weekly newspaper at the city of Mauston, in Juneau county, Wisconsin, having a general circulation in said Juneau county and points within the state of Wisconsin adjacent thereto.

"That on the 3d day of February, 1921, the defendants maliciously composed and published concerning the plaintiff in said newspaper the false and defamatory matter following, to wit: 'Assemblyman *Frank Hanson* is acquiring some more cheap notoriety by sneering at prohibition enforcement in an outburst which asserts that to get drunk is human and keeping booze from a man is chaining him up. Jollying the liquor interests has so become a habit with him that he does not recognize its futility.'

"That by means of said publication the plaintiff was injured in his reputation, to his damage," etc.

The defendants interposed a demurrer to the plaintiff's complaint on the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and this appeal is taken from such ruling.

Upon the demurrer the allegations of the complaint must be taken as true. This being so, the things alleged to have been published of and concerning the plaintiff, his office and profession, must be regarded as false, and as such knowingly published by the defendant. *Gauvreau v. Superior Pub.*

Co. 62 Wis. 403, 407, 22 N. W. 726; *Street v. Johnson,* 80 Wis. 455, 457, 50 N. W. 395. The matter, therefore, to be determined by this court is whether the demurrer was properly overruled.

Is the article published libelous? It will be noted that the complaint alleges that the plaintiff at the time of the publication was a practicing lawyer in the city of Mauston, in Juneau county, Wisconsin, and was of good name and credit as such lawyer, and that he was also during such time the elected and qualified member of assembly of Juneau county, Wisconsin, and was performing the duties of assemblyman at that time, and that the legislature of Wisconsin was then in regular session.

Under the provisions of sec. 2586*a*, Stats., an attorney at law is required in open court to take an oath or affirmation, in which, among other things, he must swear or affirm that he will support the constitution of the United States and the constitution of the state of Wisconsin. As an attorney he is an officer of a court of justice (6 Corp. Jur. p. 566), and owes an obligation to the public no less significant than his obligations to his clients (6 Corp. Jur. p. 568).

Sec. 28, art. IV, of the constitution of the state of Wisconsin provides that members of the legislature shall, before they enter upon the duties of their respective offices, take and subscribe an oath or affirmation to support the constitution of the United States and the constitution of the state of Wisconsin, and faithfully to discharge the duties of their respective offices to the best of their ability.

Sec. 19.01, Stats., prescribes the form of oath to be taken by an assemblyman before he enters upon the performance of the duties of his office, which form is in compliance with the constitutional provisions of this state above referred to.

While the plaintiff at the time alleged in the complaint was both an attorney at law and a member of the legislature, and having presumably complied with the provisions of the constitution and of the statutes of the state, the alleged libel-

ous article set forth in the complaint above was published. It charges, among other things, that the plaintiff is acquiring some more cheap notoriety by sneering at prohibition enforcement in an outburst which asserts that to get drunk is human and keeping booze from a man is chaining him up.

At the time of the publication of the alleged libel, the Eighteenth amendment to the constitution had become and was a part of the organic law of the United States, and the enforcement law known as the Volstead act (41 U. S. Stats. at Large, 405, ch. 85) had been duly passed and was in full operation throughout the United States. Prohibition laws had also been adopted and were in force in the state of Wisconsin.

The constitutional provision known as the Eighteenth amendment, and the enforcement act known as the Volstead act, constitute a crystallization in the form of law reflecting the public sentiment of the citizens of the United States, and such enactments must be obeyed and are entitled to be respected by all good and loyal American citizens.

Under these circumstances, to charge the plaintiff in a published article with sneering at prohibition enforcement in an outburst which asserts that to get drunk is human and that keeping booze from a man is chaining him up, properly interpreted, clearly means and implies not only that he is opposed to the enforcement of the constitutional amendment under the enforcement act, but that he entertains views contrary to good morals on the subject of intoxication. The publication of such an article under the circumstances detailed involves, therefore, a charge which touches the plaintiff in his public office as a member of the legislature and in his profession as an attorney at law, in both of which capacities he has taken an oath to support the law and aid in its enforcement. It not only touches him in the capacity of an officer and in his professional capacity as an attorney, but also as a citizen, inasmuch as it holds him up before the public as one who is opposed to the enforcement of the constitu-

tional provision referred to and of the Volstead act, but as entertaining views on the subject of intoxication contrary to sound public morals; therefore the article in question must necessarily be considered as holding up the plaintiff as an individual, an officer, and as an attorney, as an object of hatred, ridicule, and contempt.

The article in question is not one privileged as offering fair criticism of plaintiff's acts as an assemblyman or as a citizen.

In *Bradley v. Cramer,* 59 Wis. 309 (18 N. W. 268), at page 311 it is held:

"It is settled that an action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt, or ridicule, even though the same words spoken would not have been actionable. . . . Written slander is necessarily attended with such deliberation, and its publication is so well calculated to produce permanent mischief, that an action may be maintained for the publication of written words when it could not be maintained for the publication of the same words by mere oral discourse. . . . Hence, every written publication which implies, or may be generally understood to imply, reproach, dishonesty, scandal, or ridicule, to any person, is a libel."

It is contended by the appellants that inasmuch as the plaintiff was an assemblyman the publication of the article was conditionally privileged.

"Conditional privilege as regards newspaper activity does not go beyond fair criticism in respect to the relations of persons to the public and report of facts. It does not extend to false statements of fact or unjust inferences, nor taunts, nor contemptuous and insulting phrases." *Williams v. Hicks P. Co.* 159 Wis. 90, 102, 150 N. W. 183.

In order to constitute the alleged libelous article conditionally privileged, the publisher of the article must not be actuated by malice, and malice is expressly charged in the complaint. Consequently, upon the face of the complaint, it cannot be contended that the article is conditionally privi-

leged. *Williams v. Hicks P. Co.* 159 Wis. 90, 102, 150 N. W. 183.

We hold, therefore, that the complaint states a good cause of action; that the article in question touches the plaintiff in his office and profession, and also as an individual and citizen, and in such capacities holds him up to the public as an object of hatred, ridicule, and contempt, and is not conditionally privileged. The order of the circuit court overruling the defendants' demurrer is therefore sustained.

By the Court.—Order overruling demurrer affirmed.

GERLACH, Respondent, vs. GRUETT, Appellant.

October 20—November 15, 1921.

Libel: Conditional privilege: Express malice: Inconsistent findings in verdict: Charges of immorality against pastor: Evidence: Relevancy: Damages: Remission in part or new trial.

1. One may believe charges made by him to be true, be within the field of conditional privilege so far as purpose of communication and persons addressed are concerned, and yet be actuated by express malice. If express malice be found, it destroys the conditional privilege that would otherwise obtain.
2. In an action by a pastor for damages for libel consisting of charges of misconduct with a girl, the court did not err in striking out a portion of defendant's answer which alleged in substance that during the war the pastor refused to preach in the English language.
3. The court properly refused to receive evidence as to the duties of a Lutheran minister to his congregation to the effect that a stricter rule of morals was required than in ordinary life, because the conduct charged is adequately condemned by the prevailing code of morals as well as by the law.
4. The court in granting a new trial unless the plaintiff elected to accept a sum stated, which was less than the damages found by the jury, should have placed the amount as low as an impartial jury on the evidence would probably name; when the option is given the defendant, the sum should be as high as such a jury would probably find.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Action for libel based upon three letters written by the defendant, a member of the church of which the plaintiff was the minister, and addressed respectively to Rev. A. F. Augustin, Eau Claire, Wisconsin; Rev. O. Gammelin, Beaver Dam, Wisconsin, and Rev. A. Pilger, Ripon, Wisconsin, which letters were received and read by the respective persons to whom they were addressed. The letters were written in the German language and were translated as follows:

"Rosendale, Wisconsin, Aug. 20, 1919.

"Esteemed Pastor: In the Synodical Report on page twenty, I read, that it is really pleasant, that the Pastor in Rosendale was justified from the charges resting against him. If the Synod has no other justification than one of this character, then not very many of the dearly purchased souls of our Saviour will enter into the haven (harbor) of the eternal home, for that very girl, which at the meeting at Rosendale was declared to be an honorable girl, and which *Gerlach* held in his arms, the one which *Gerlach* called to himself into the automobile, and said (to her) come let us anger *Gruetts,* that girl now has, since the 7th day of August, a strapping boy, she has no husband (man) and for a the child, *they cannot find the father* or discover him. Perhaps the committee could help out again, the adage says, Tell me with whom you associate, and *I will* tell you who you are. It transpired here, as the Scriptures say, For wheresoever the carcase is, there will the eagles be gathered together. And such a girl the local pastor takes around, and the Synod rejoices because he has been justified. I can tell, only tell you, there was a commotion and an row here, and it is still going on. If I would be in *Gerlach's place* I would be gone over all hills. I only have to wonder, that such men (people) dare to hang around (occupy) Lutheran pulpits. It cannot go on this *way* for very long any-more, for the attendance at the services is constantly growing worse, and the members are getting less. It is no wonder that the judgments of God are being wreaked so heavily upon mankind. Yes, we have all reasons to sing with that poet, Awake, you spirit of the early witnesses, which stood upon

the walls as *faithful* watchmen. Just here there is something missing in the upright faithfullness. Faithful in actions, faithful in life, if it would be thus, all things would be well. I am *surprised* that the Synod does not step in here, and bring about a change of pastors. Always more witnesses are appearing here, (stepping up) to testify that my claims are resting upon truth.

"Now, Mr. Pastor Augustin, I should think, that this would suffice, to cause you, as the President of the District, to do some serious thinking.

"With sincere greetings,
"signs
"FRANK GRUETT (signed)."

"Rosendale, Wisconsin, August 21, 1919.
"Mr. Reverend O. Gammelin, Beaver Dam.

"Dear Sir: In the Synodical Report it is stated: We are pleased, that the pastor at Rosendale was cleared *from* the charges resting against him. A sorry justification, for that girl, which was declared to be an honorable girl at the meeting of March 25th, the one which *Gerlach* embraced in an automobile, the one which *Gerlach* called into his automobile with the words, Come, let us anger *Gruett,* this very girl has since the 7th day of August a strapping youngster, she has no husband, and the boy has no father, neither can they find one for him. *How easily could an* (*investigating*) *visiting commission help out again* here. However, it is a disgrace and a sin, that such men (people) are permited to hang around (occupy) Lutheran pulpits. It is no wonder that the judgments of God are wreaked over humanity. Enough, I hope, that this will suffice to cause you to do some very serious thinking.

"Greetings from,
"F. GRUETT (signed)."

"Rosendale, Wisconsin, August 21, 1919.
"Mr. Reverend Pilger, Ripon.

"Esteemed Pastor: In the Synodical Report I read, that We are pleased that the pastor in Rosendale was cleared from the charges resting against him. If the Synod has no other justification than one of that character, then not very many of the dearly purchased souls of our Saviour will enter

into the haven (harbor) of the eternal home; for that girl, which at that meeting here in *Rosendale* on March 25th was declared to be an honorable girl, the one which *Gerlach* embraced, the one which *Gerlach* called into the automobile, Come, let us anger *Gruetts,* this very girl now has since the 7th day of August a strapping boy. She has no husband (man) and the poor boy, it seems, has no father, neither can they find one. Perhaps a committee could help out again here. I do not want to write a great deal, the whole business is nauseating to me already, it is a disgrace and a sin, that such men (people) are permitted *to* hang around (occupy) Lutheran pulpits. I once more would like to speak to you personally. When you were in Green Lake, I was there too, but at that time, I knew nothing about this row.

"With friendly greetings,
"signs
"F. GRUETT (signed)."

The answer put in issue the libels alleged in the complaint and the jury returned a special verdict as follows:

"(1) Did the defendant write the letter to Rev. Augustin for the purpose of procuring a rehearing of the charges previously preferred against the plaintiff, believing the Rev. Augustin a proper officer of the Synod through whom to procure such rehearing, and with an honest belief that the plaintiff was guilty of all the misconduct as a clergyman imputed to him by said letter? *A.* Yes.

"If to 1 you answer 'Yes,' answer 2:

"(2) Was the defendant actuated by malice in writing said letter? *A.* Yes.

"(3) What sum will compensate the plaintiff for the injury to his reputation, feelings, and his professional standing caused by the writing of the libelous matter in the letter to Rev. Augustin? *A.* $2,000.

"(4) Did the defendant write the letter to Rev. Gammelin for the purpose of procuring a rehearing of the charges previously preferred against the plaintiff, believing the Rev. Gammelin a proper officer of the Synod through whom to procure such rehearing, and with an honest belief that the plaintiff was guilty of all the misconduct as a clergyman imputed to him by said letter? *A.* Yes.

"If to 4 you answer 'Yes,' answer 5:

"(5) Was the defendant actuated by malice in writing said letter? *A.* Yes.

"(6) What sum will compensate the plaintiff for the injury to his reputation, feelings, and his professional standing caused by the writing of the libelous matter in the letter to Rev. Gammelin? *A.* $1,500.

"(7) What sum will compensate the plaintiff for the injury to his reputation, feelings, and his professional standing caused by the writing of the libelous matter in the letter to Rev. Pilger? *A.* $1,500."

The court gave plaintiff the option to take judgment for $500 on each cause of action or a new trial because he was convinced that the jury "failed to give proper consideration to the limitation of the publication, and wrongfully charged up to defendant, as an element of damage in this case, the harm done and injury wrought by the previous proceedings and the public hearing respecting matters involved and the extended publication and wide notoriety consequent thereto." Plaintiff early in the trial waived punitory damages and accepted judgment for $1,500 and costs, from which judgment the defendant appealed.

T. L. Doyle of Fond du Lac, for the appellant.

R. L. Morse of Fond du Lac, for the respondent.

VINJE, J. It was suggested upon the oral argument that there was an inconsistency between answers to questions 1 and 2 and 4 and 5 because questions 1 and 4 as answered included a finding that defendant was actuated by good-faith motives and not by malice and hence contradicted the answers to questions 2 and 5 finding malice. In view of the instructions given and the wording of the questions we think the answers to questions 1 and 4 found only that the purpose for which the letters were written and the persons to whom they were directed were within the field of conditional privilege and that the defendant believed the charges to be true, but that they did not find entire good faith and absence

of malice. One may believe charges to be true, be within the field of conditional privilege so far as purpose of communication and persons addressed are concerned, and yet be actuated by express malice. If express malice be found it destroys the conditional privilege that would otherwise obtain. *Rude v. Nass,* 79 Wis. 321, 328, 48 N. W. 555; *Joseph v. Baars,* 142 Wis. 390, 125 N. W. 913; *Arnold v. Ingram,* 151 Wis. 438, 458, 138 N. W. 111; *Williams v. Hicks P. Co.* 159 Wis. 90, 150 N. W. 183. So we conclude there is no inconsistency between the answers to the specified questions.

We shall refer briefly to only a few assignments of error because, for reasons to be stated, the case must go back for a new trial unless plaintiff accepts the option granted by this court.

The court struck out a portion of defendant's answer which alleged in substance that during the war plaintiff refused to preach in the English language though petitioned to do so by members of the parish, thus indicating, it is alleged, a lack of patriotism. We fail to see how that was relevant to any issue arising out of the alleged libel. Its only purpose could have been to prejudice the plaintiff in the eyes of the jury, and the court properly struck out that portion of the answer.

The court likewise properly refused to receive evidence as to the duties of a Lutheran minister to his congregation to the effect that a stricter rule of morals was required than in ordinary life, because the conduct charged in the letters is adequately condemned by the prevailing code of morals as well as by the law.

The court also properly refused to submit questions eliciting the fact as to whether or not the matters charged in the letters were true, because the evidence was too vague and inconclusive to sustain a finding that they were true.

We shall not examine the alleged erroneous portions of the charge relating to damages because the verdict as to damages was set aside by the trial court, and we must set

aside his assessment because he erred in making it. He gave an option to plaintiff to take $500 compensatory damages for each letter written, stating that he did so because he considered "that a jury moved by proper considerations in this respect would hardly go above $500 as damages for each of the letters, or $1,500 in gross." In giving the option to the plaintiff he should have placed the amount as low as an impartial jury on the evidence would probably name, not as *high* as such jury would probably go. The latter must be done when the option is given to the defendant. *Heimlich v. Tabor,* 123 Wis. 565, 102 N. W. 10; *Beach v. Bird & Wells L. Co.* 135 Wis. 550, 116 N. W. 245; *Katz v. Miller,* 148 Wis. 63, 133 N. W. 1091; *West v. Bayfield M. Co.* 149 Wis. 145, 135 N. W. 478; *Krawiecki v. Kieckhefer B. Co.* 151 Wis. 176, 138 N. W. 710; *Poler v. Mitchell,* 152 Wis. 583, 140 N. W. 330.

For the purpose of permitting this unfortunate litigation to end, we have concluded to give plaintiff the option to take judgment for $200 as compensatory damages for each letter published, or $600 in gross, or a new trial, such option to be exercised within thirty days from the date of the receipt by the circuit court for Fond du Lac county of the record from this court.

By the Court.—Ordered accordingly, with costs on this appeal to the defendant.

RIDDLE, Appellant, vs. LODI TELEPHONE COMPANY, Respondent.

October 20—November 15, 1921.

Telephones: Right of way: Condemnation: Damages: Accessibility of line as special benefit: Ascertainment of damages: Elements.

1. In condemnation proceedings for the purpose of acquiring a right of way for a telephone line in front of farm premises, accessibility to the line is a general public benefit and not a

"special benefit" to the lands, in the sense in which that term is used in sec. 32.10, Stats.

2. The measure of damages in such case was the difference between the value of the premises as they were without the telephone line and their value after the line was erected; and the accessibility of plaintiff's premises to the line should not be considered.
3. Where premises are condemned for a right of way for a telephone line, the landowner may show the full use to which the condemned property may be put by the appropriator.
4. The market value of property taken for a public use shall be ascertained as of the time of the taking, and where there has been no entry this time is ordinarily that of the award of damages; but where there has been a lawful entry, the damages shall be awarded as of that date, and no damages for trespass after entry can be allowed.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Reversed.*

Condemnation. The defendant company instituted condemnation proceedings for the purpose of acquiring the right to erect and maintain a telephone line in front of the farm premises owned by the plaintiff. The commissioners awarded six cents damages, from which the plaintiff appealed to the circuit court for Columbia county. There was a trial, the question of damages was submitted to the jury, and the jury awarded $50 damages, for which judgment was entered, from which the plaintiff appeals.

For the appellant there was a brief by *Grotophorst & Quale* of Baraboo, and oral argument by *Norman Quale.*

For the respondent there was a brief by *J. L. Mahoney,* attorney, and *H. E. Andrews,* of counsel, both of Portage, and oral argument by *Mr. Andrews.*

ROSENBERRY, J. By objections to the admission of evidence and exceptions thereto, by requests for instructions, and by exceptions to the instructions given, the appellant raises three questions:

First. What is the correct rule as to the measure of damages where a telephone company condemns the right to erect

and maintain its lines on a public highway adjacent to a farm?

Second. Upon the trial of the issue as to damages, may the owner show the full extent of the use to which the condemned premises may be put?

Third. In an action or in a proceeding for condemnation, may the owner recover as part of the damages injuries resulting from prior trespass?

In ruling upon the admission of certain evidence as to whether or not the witness should take into account the accessibility of the premises of the plaintiff to the telephone line, the court said:

"It is proper for the jury to consider the presence of the telephone line and the accessibility that it furnishes for ordinary public use, but no special use, of course, to the plaintiff is involved in the case at all."

In instructing the jury the court said:

"Remember that the measure of damages is, as I stated to you, the difference between the market value or selling value of the two parcels of land upon July last with the telephone line upon it and without such telephone line, and the rights incident to the maintenance of the line."

It is the contention of the plaintiff that this is contrary to the rule laid down in *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328, and subsequent cases. In that case the court said:

"The location of a depot at a given point is a general public benefit, although, as in the case of any general benefit created by public improvements, one citizen may be more directly and largely benefited than another. . . . That statute [sec. 1848, R. S. 1878] provides only for the allowance of special benefits in such cases, and such is not the character of the benefit under consideration. It would seem that a benefit which may thus be allowed is one which enhances the value of the land affected by it, by improving its physical condition and adaptability for use; such as by reclaiming waste land, by draining or flowing a marsh, by

aiding in the development of a water power, by dispensing with the necessity of maintaining fences, or by opening a mine or quarry, and the like. We are unable to conceive of any other kind of benefits which are not general benefits as well, and hence outside the statute."

The language of sec. 1848, R. S. 1878, is substantially the same as the language of sec. 32.10, Stats. 1919, applicable to the proceedings in this case. The statute says:

"They [the commissioners] shall not make any deduction because of any benefit which the parties may derive from the construction of the improvement for which the property is taken, but special benefits to lands adjoining the lands so taken may be allowed in deduction of any damages sustained by the owner to such adjoining land."

Manifestly, in the present case, the land of the plaintiff upon which the telephone line is situated is no more accessible to the telephone line than the land on the opposite side of the highway which sustains no burden by reason of the erection of the telephone line. Accessibility to the line is a general public benefit which accrues to the owners of all property served by the telephone system and is not a special benefit to the lands of the plaintiff in the sense in which that term is used in sec. 32.10. This is the construction placed upon the statute in *Washburn v. M. & L. W. R. Co.* 59 Wis. 364, 18 N. W. 328, and subsequent cases. *Gosa v. Milwaukee L., H. & T. Co.* 134 Wis. 369, 114 N. W.. 815; *Pierce v. Chicago & M. E. R. Co.* 137 Wis. 550, 119 N. W. 297.

In many jurisdictions holding that a telegraph or telephone line in a highway is an added burden on the fee, the rule is that the damages recoverable are nominal unless special and unusual damages are proved. Note to 8 A. L. R. 1310. Our statute, however, makes no distinction between a taking by a telephone company and a taking by any other appropriator, and the rule of damages is that established by the provisions of sec. 32.10. The plaintiff was therefore entitled to an instruction that the measure of damages was

the difference between the value of the premises as they were without the telephone line and the value of the premises after the telephone line was erected, and that in ascertaining such difference the fact that the premises were accessible to the telephone line should not be considered. Such benefit as the plaintiff received in that respect was in the nature of a general public benefit and not a special benefit within the meaning of sec. 32.10.

Second. Upon the trial the plaintiff sought to show that under the law as it now stands the defendant might, by order of the railroad commission, be required to permit the stringing of wires of other companies upon its poles. Evidence of this kind was excluded. The plaintiff is entitled in a proceeding of this character to show the full use to which the condemned property may be put by the appropriator. *Pierce v. Chicago & M. E. R. Co.* 137 Wis. 550, 119 N. W. 297. In passing upon this element of damages the jury, however, should be cautioned not to consider mere remote, speculative, and improbable uses, but to confine their consideration to the facts as actually shown by the evidence.

Third. The plaintiff complains because the court refused to permit her to prove as a part of her damages the injuries she sustained by reason of a prior trespass upon the premises. It is a fundamental principle that the market value of property taken for a public use shall be ascertained as of the time of the taking. Our statute provides that the commissioners shall determine the "damages sustained by the taking." Where there has been no occupation of the premises, this time is ordinarily that of the award of damages. Where, however, there is an entry upon the property by the consent of the owner, express or implied, so that the appropriator is in lawful possession, the time as of which the damages shall be ascertained is the time when the premises were taken. In this case it appears that the defendant company had been in lawful possession of the premises for a considerable time. On and after the date when the appropri-

ator is rightfully upon the premises, whether by consent of the owner or in accordance with the terms of the particular statute under which the proceeding is had, he is no longer a trespasser and therefore damages for trespass cannot be allowed, as the trial court held. *Aspinwall v. C. & N. W. R. Co.* 41 Wis. 474. See *Kennedy v. M. & St. P. R. Co.* 22 Wis. 581; *West v. M., L. S. & W. R. Co.* 56 Wis. 318, 14 N. W. 292. See, also, cases cited in 20 Corp. Jur. 829.

By the Court.—Judgment reversed, and cause remanded for a new trial.

HUSTIS and another, Appellants, vs. MCWILLIAMS and another, Respondents.

October 20—November 15, 1921.

Estoppel: Failure to assert title: Innocent purchasers: Duty to make search of records.

1. In ejectment by the daughters of defendants' predecessor in title, claiming as beneficiaries under the will of their mother, where plaintiffs, when they signed a lease of adjacent lands to their father's grantee, knew of the prior deed to the property in question to such grantee and that testatrix had been adjudged the owner in fee of such property, but did not repudiate the deed nor assert title until commencement of the action, they were estopped to do so as against an innocent purchaser for value.
2. The evidence relative to the estoppel of plaintiffs to claim title is *held* to show that their father's grantee did not know, at the time of the conveyance to him, that testatrix had been adjudged the owner of the land, and that, in view of the grantee's knowledge of transactions regarding the property by plaintiffs' father and the relationship of the parties, he was not bound, as against plaintiffs, to search for a title they did not assert.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The two plaintiffs, sisters, daughters and beneficiaries under the will of Laura A. Hustis, the wife of one John Hustis,

also now deceased, have brought this action of ejectment to determine the question of the ownership of two pieces of land each twenty-five feet square in the village of Hustisford, Dodge county. These two pieces are portions of what was known as government lots 4 and 5, lot 4 being on the east side and lot 5 on the west side of Rock river, all in the north half of the southeast quarter of section 9, township 10 north, range 16 east, Dodge county. They have appurtenant to them the right to the dam there built and the water power thereby created, except such of the latter as has been previously conveyed.

The premises in question and a great deal more, including that from which the present village of Hustisford was subsequently platted, were in 1841 patented to said John Hustis and the patent therefor subsequently duly recorded.

In 1845, by an act of the territorial legislature, a charter was granted to John Hustis, his associates, successors, and assigns, to build and maintain a dam across the Rock river in the said north half of the southeast quarter of section 9 on lands owned by him. Such dam was built at a point a little north of the present location, then one built at its present location on the lands now here involved and the former one abandoned. Substantially all the water power created by such dams was subsequently conveyed to the owners of two mills respectively, one known as the Koch mill and the lower as the Dehne mill.

In March, 1858, this north half of the northeast quarter of section 9 was sold by the sheriff of Dodge county on an execution issued against John Hustis on a judgment recovered against him by one Wood. Wood assigned the certificate of sale to one James Ludington, brother of Laura A. Hustis. In 1860 the sheriff of Dodge county, pursuant to such sale, issued his deed for government lots 4 and 5 (it being conceded they were included in the said southeast quarter of section 9) to said Ludington, who in November of that year conveyed said lots 4 and 5 and other lands to said Laura A. Hustis.

The lands in question were on several occasions sold for nonpayment of taxes and tax deeds issued, and the interest, if any thereby acquired, subsequently conveyed, but no further statement is deemed necessary with reference to any question of title arising therefrom.

By a fire in September, 1877, the records kept in the office of the register of deeds of Dodge county were entirely destroyed.

December 26, 1900, Laura A. Hustis died testate, her will was duly probated, and the plaintiffs were the residuary legatees therein.

In February, 1902, John Hustis caused notice to be served on the owners of the water-power and mill-sites, Koch and Dehne, as follows:

"In answer to your communication dated January 13, 1902, I have to say that I am not maintaining the dam referred to therein. I have abandoned said dam, and claim no further interest therein. If it is in the condition you say, I request you to open the gates and let the water run out."

March 8, 1904, John Hustis executed and delivered to Frederick Dehne a written conveyance of real estate in Dodge county which, it is conceded, includes the strips of land in question, and which said conveyance described the property intended to be conveyed as follows:

"All my right, title and interest in and to the charter granted to me by the legislature of Wisconsin to build and maintain a dam on Rock river in section nine (9), town ten (10), range sixteen (16) east, known as Hustis Rapids, in the county of Dodge, state of Wisconsin. Together with any and all rights occasioned by the erection of said dam, together with any and all the lands east and north of Canal street south of dam, in the village of Hustisford in said county, extending south and east to end of mill-race or canal, all of said lands lying west and south of Rock river, also a square piece of land 25 feet each way on the east and west ends of said dam, excepting the rights and mill privileges deeded to John W. Cole, Waldo Lyons, and Josiah Everett, dated August 31, 1855, and same rights and privileges

deeded to F. Koenig and John F. Koch dated August 18, 1864. This deed is meant to cover all and any lands I now own or be possessed of lying east and north of Canal street, which is fifty feet wide, and in part consideration hereof the said Fred Dehne, for himself, his heirs, or assigns, is to assume all and any expense, costs, or damages that may hereafter occur by reason of maintaining said dam, and to protect in every way the interest of John Hustis, his heirs or assigns."

On the same day the said John Hustis and the plaintiffs executed and delivered to the said Dehne a written instrument called hereafter the gravel-pit lease, giving to the said Dehne certain rights to remove gravel for use in repairing and maintaining the dam in question here from a strip of property adjacent to the dam, the material part of which writing was as follows:

"A certain right to haul and take away any and all gravel stones and dirt on a piece of land 150 feet square, commencing at a point (Iron Pin) at the northeast corner of a twenty-five feet square on east end of Hustisford dam heretofore deeded to said Frederick Dehne and extending northeasterly and northerly 150 feet each way from said point. Together with a right of way to and from said twenty-five feet square above mentioned northerly and along the east bank of Rock river as now used to the Hustisford and Woodland road, said gravel or dirt not to be removed lower than five feet above high-water mark on said river."

The consideration mentioned in the conveyance from Hustis to Dehne in 1904 was $350, and that in the conveyance of the right to take gravel, signed by Hustis and the plaintiffs, was $1. It is undisputed that John Hustis received at the time of the execution of the two instruments $450 and that neither of the plaintiffs received any sum whatever.

In 1894 one John F. Koch, who was then the owner of one of the mills receiving power from said dam, brought a suit in the circuit court for Dodge county against John

Hustis and Laura A. Hustis as owners of the dam here in question to recover a certain share of the cost of repairs. Laura A. Hustis in that case answered denying ownership of the dam except as to dower interest, and John Hustis answered alleging sole ownership. On the trial it was found by the referee, and subsequently confirmed by the circuit court, that Laura A. Hustis owned the dam at the time of the execution of the deed under which the plaintiff Koch claimed, but that in signing such deed she acted upon the assumption that her husband was the owner. The circuit court confirmed the referee's report and adjudged that both John Hustis and Laura A. should pay damages to Koch. The cause was appealed to this court and is reported in 113 Wis. 599, 87 N. W. 834. The judgment therein was here reversed and the complaint ordered dismissed. In the statement of facts in that case it was stated (page 600):

"At the time of the making of this deed [referring to the deed of the water power to Koch] Laura A. Hustis was the owner in fee of the premises deeded, and also of the milldam referred to in the deed and the canal and mill-race. This milldam was situated at Hustisford in Dodge county, and lay across the Rock river. The lot conveyed by the deed aforesaid was below the dam, and no part of the dam was in terms conveyed by the deed."

John Hustis died in 1907, then over ninety-seven years old.

This action was commenced in 1908 against several defendants, but by subsequent proceedings such other defendants were eliminated and the action finally tried as against the defendants above named, who claim title by mesne conveyances of the right to these two pieces of twenty-five feet square each by virtue of the conveyance of March, 1904, from said John Hustis to Dehne, and asserting that as to any title to such property that may have existed in the plaintiffs as residuary legatees of Laura A. Hustis, their mother, the plaintiffs were estopped to assert the same by reason of

their failure to assert such at the time of the conveyance by John Hustis in March, 1904, and by the recital as to such conveyance in the gravel-pit lease of the same date.

The trial court held the plaintiffs estopped from asserting title to the parcels of land and the dam in question, and directed judgment for the defendants dismissing the complaint upon the merits. From such judgment the plaintiffs appealed.

For the appellants there was a brief by *Husting & Husting* of Mayville, and oral argument by *B. A. Husting.*

For the respondents there was a brief by *Thompson, Myers & Kearney* of Racine, attorneys, and *F. Ryan Duffy* of Fond du Lac, of counsel, and oral argument by *Mr. P. M. Myers* and *Mr. Duffy.*

ESCHWEILER, J. The appellants in this case assert that there is no proper foundation in the evidence for certain of the findings of fact upon which the court reached its conclusions of law in favor of the defendants. The substance of the findings so attacked is as follows: That the plaintiffs knew at the time of their signing the so-called gravel-pit lease of the giving of the deed to the property in question by their father, John Hustis, to Dehne; that the plaintiffs knew at such time of the statement in the opinion of this court in the case of *Koch v. Hustis,* 113 Wis. 599, 87 N. W. 834, and quoted *supra,* that Laura Hustis was there declared to be the owner in fee of this property; that Dehne, at the time of the deed to him by John Hustis in 1904, did not know of the ownership by Laura Hustis of the property nor that it had been so found by the court in which that action was tried, nor that it was so stated in the opinion of this court on the appeal of said case. An examination of the testimony, however, convinces us that there is evidence in this record to fully support each one of such challenged findings.

The plaintiff, *Mrs. Anthony,* with her husband had lived at Hustisford many years prior to 1904; Mrs. Hustis and

the plaintiff *Josephine L. Hustis* had made their home in Milwaukee for a great many years prior to the mother's death in 1900, although keeping up the family relationship with the husband and father, John Hustis, who lived from young manhood until his death in 1907 at the now village of Hustisford. It appears that John Hustis was substantially the only one, so far as the Hustis family is concerned, who took any active steps with reference to the keeping up of this property. So far as plaintiffs or their mother were concerned, John Hustis made all the assertions of ownership to this particular property. When repairs were to be made they were done under his supervision and direction. The revenues that came in any way connected with this property went through his hands. He repeatedly, during his long life in the vicinity and long after the conveyance to his wife by her brother, James Ludington, declared the dam itself to be his property. The notice of February, 1902, by John Hustis to Koch and Dehne, set out in the statement of facts, is of no significance as indicating any repudiation of title to the real estate by John Hustis or recognition by him of title in his children, and clearly relates to the upkeep of the structure of the dam and nothing else. It further appears that the plaintiff *Josephine L. Hustis* did know in 1902, from conversations had with the late General Winkler, her counsel in the case of *Koch v. Hustis, supra,* that it had been therein determined that the mother rather than the father was the owner in fee of the property in question here. It also appears that she was informed by her sister, *Mrs. Anthony,* then living at Hustisford, that the father was conveying this property to Dehne, and such information came to her at or prior to the time she herself signed the gravel-pit lease.

No steps were taken by either of the plaintiffs to repudiate the transaction or assert title until the commencement of this suit in 1908.

Stress was laid upon the fact that Dehne, to whom the conveyance was made in 1904 and through whom the de-

fendants claim title, must have known that Mrs. Hustis rather than her husband was the owner, on the ground that search as to the title would have disclosed; and furthermore, that having been a witness in the lawsuit between Koch and Mr. and Mrs. Hustis he must have known the result of such lawsuit and of the finding therein made, and sustained here, that the title was in Mrs. Hustis. He testified that he did not know, and the court was justified in so finding, and that Dehne, who had lived in the neighborhood many years, seeing and knowing of the transactions regarding this property by Mr. Hustis and of the relationship of the parties, was not, as against plaintiffs, bound to search for a possible title which plaintiffs might have had but did not then assert.

It was plaintiffs who knew or ought to have known that there was a possible claim on their own behalf to this property derived from their mother's estate at the time they joined in the gravel-pit lease knowing of the conveyance, for a valuable consideration, by the father to Dehne, acting in good faith and in reliance upon the assertion of title by John Hustis.

The property here involved was evidently considered as of no very great value at the time, as indicated by the consideration of only $450 paid by Dehne to John Hustis for such conveyance and the rights secured by the gravel-pit lease. Plaintiffs, without present protest, permitted this entire consideration to be paid to John Hustis. If their claim of title now asserted was then valid, the entire consideration belonged to them and not to their father. Their acquiescence in this transaction by their father under his assertion of title, with the knowledge they then had of the situation, brings them well within the doctrine that he who speaks not in assertion of his rights when he may, is, as to one who acts in reliance upon such situation, forever after bound to keep his peace and cannot subsequently assert such right as against such good-faith and relying purchaser. *Vilas v. Mason*, 25 Wis. 310, 323, 324; *McLean v. Dow*, 42 Wis. 610, 614; *Two*

Rivers Mfg. Co. v. Day, 102 Wis. 328, 332, 78 N. W. 440; *Marling v. Nommensen,* 127 Wis. 363, 369, 106 N. W. 844; *Williams v. J. L. Gates L. Co.* 146 Wis. 55, 61, 130 N. W. 880; *Mariner v. Milwaukee,* 146 Wis. 605, 609, 131 N. W. 442; *H. W. Wright L. Co. v. McCord,* 145 Wis. 93, 100, 128 N. W. 873; Jones, Evidence (2d ed.) § 275.

This disposition of the case renders it unnecessary to consider the exceptions presented by the defendants on certain of the findings of the trial court or any of the other questions presented on this appeal.

By the Court.—Judgment affirmed.

MACKENZIE, Respondent, vs. STAUDENMAYER, Appellant.

October 21—November 15, 1921.

Brokers: Contract of employment: Validity: Necessity of wife's signature: Homestead.

Sec. 2203, Stats., invalidating the alienation of a married man of his homestead without his wife's consent, does not void a contract made by the husband with a real-estate agent to procure a purchaser therefor, and the latter is entitled to his commission when he produces a purchaser ready, able, and willing to buy, even though the wife did not sign such contract and even though the husband knew she would not join in a conveyance of the homestead.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Defendant was the owner of a farm consisting of 214 acres of land, forty acres of which constituted his homestead, on which he resided. On June 14, 1919, defendant, by a written contract, employed plaintiff to "sell or find a buyer" for the farm, agreeing to pay him two per cent. commission therefor, and gave him the exclusive sale until October 1, 1919. On June 28th the plaintiff found a purchaser for the farm, who was ready, willing, and able to purchase

said property at the price fixed in said brokerage contract and to comply in all respects with the terms in said contract stipulated. Defendant's wife, however, refused to join in a conveyance of said farm, by reason of which the sale was not consummated. Plaintiff brought this action to recover his commission under the terms of said contract. Judgment was rendered in his favor, from which the defendant brings this appeal.

William Ryan of Madison, for the appellant.

For the respondent there was a brief by *J. L. Mahoney*, and oral argument by *W. H. Farnsworth*, both of Portage.

OWEN, J. Defendant claims the brokerage contract employing the plaintiff to sell, or procure a purchaser for, the farm is void because the same was not signed by his wife, which he contends is necessary by virtue of sec. 2203, Stats., which provides that "No mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, without his wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance, shall be valid or of any effect whatever, except a conveyance from husband to wife." It is to be noted that this statute relates only to contracts which constitute an alienation of the homestead or some interest therein. It does not apply to any and all contracts relating to or affecting the homestead. A contract for the digging of a well, or the building of a house, or for plowing or ditching the premises, is not affected by the provisions of the statute quoted, for the reason that such contracts do not alienate the homestead or any interest therein. The contract here under consideration employed the defendant to procure a purchaser for the farm, including the homestead. It was a contract of employment merely. It did not alienate the homestead or any interest therein. True, the alienation of the homestead was within contemplation, but the brokerage

contract was not one of alienation. The statute in question does not void contracts made by the husband to procure a purchaser for the homestead any more than it voids his contracts to plow, ditch, or otherwise improve such premises.

In discussing sec. 2203 in *Rosenthal v. Pleck,* 166 Wis. 598, 166 N. W. 445, it was said that "If the husband could incur a liability in an attempt to alienate it [the homestead], the liability might be more disastrous than the alienation." And in *Cumps v. Kiyo,* 104 Wis. 656, 80 N. W. 937, it was said that the "statutory policy of this state is that a wife shall possess an absolute veto upon the husband's power to alienate his homestead, and that she shall be conclusively presumed to have exercised it till the contrary appears by her voluntary act of joining with him and conveying such homestead, evidenced by her signature to the conveyance." It is contended that the underlying principle or policy justifying those expressions is applicable to the contract under consideration. It should be remembered that those expressions were used with reference to contracts unquestionably falling within the provisions of the statute, and indicated the force which this court would give the statute as applied to contracts falling within its inhibition. This contract does not fall within the purview of the statute, and the expressions quoted have no application here. The public policy of this state, as revealed by the provisions of sec. 2203, does not hamper the husband in dealing with the homestead in any respect except in the alienation thereof.

Nor can recovery be denied on the principle declared in some jurisdictions (upon which we express no opinion) that a real-estate agent cannot recover a commission where he knows of a defect in the title which will prevent the consummation of a sale and render his efforts abortive. True, the plaintiff knew that in order to convey the homestead the wife must join in the deed, but he did not know that she would refuse to do so. The defendant as well as the plaintiff knew that her signature was necessary to convey the

homestead and he was in a much better position to know whether she would join in such conveyance. If it were necessary for plaintiff to consider the matter at all, he was justified in assuming that the defendant knew what he was doing and that he was not ignorant concerning the attitude of his wife in the matter. The defendant should have known whether his wife would join in the conveyance of the homestead, and, even though he knew she would not, it was not beyond his power to enter into the contract of employment if he saw fit to do so for his personal gratification. It appears that the plaintiff in all respects fulfilled his contract by producing a purchaser ready, able, and willing to buy, and he is entitled to compensation provided for by the terms of the contract.

By the Court.—Judgment affirmed.

GRINDE, Respondent, vs. CHIPMAN, Appellant.

October 20—November 15, 1921.

Brokers: Contract of employment: Construction: Extent of authority: Performance.

1. The words "to sell" and "to sell or find a buyer" in a real-estate brokerage contract are synonymous terms.
2. A broker who is employed to procure a purchaser for real estate performs his contract and is entitled to his compensation when he produces a person ready, willing, and able to purchase upon the terms specified by the owner in the brokerage contract.
3. The authority conferred upon a broker by an agreement which employs him "to sell" does not authorize him either to execute a conveyance of the premises or to enter into an agreement to convey. *Brown v. Griswold*, 109 Wis. 275, distinguished.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

Action to recover brokerage commission for the sale of

real estate. Plaintiff was employed by the defendant to sell his farm, consisting of 320 acres, which included the homestead upon which he lived. The plaintiff secured a purchaser for the farm with whom he entered into a contract of sale. The purchaser was ready, able, and willing to comply with the terms of the said contract of sale on his part. Defendant's wife refused to sign the agreement of sale and refused to sign a deed pursuant thereto, consequently the sale was not consummated. This action was brought by plaintiff to recover his commission under the brokerage contract with defendant, and from a judgment in favor of plaintiff the defendant appeals.

H. E. Andrews of Portage, for the appellant.

Robert N. Nelson of Madison, for the respondent.

OWEN, J. The only difference between this case and *Mackenzie v. Staudenmayer, ante,* p. 373, 185 N. W. 286, is that in this case the broker was employed "to sell" the farm, while in that case the employment was "to sell or find a buyer." This case is therefore ruled by the decision in the *Mackenzie Case* in all respects unless the dissimilarity of the language in the brokerage contracts above noted compels a different result.

It is well settled that a broker who is employed to procure a purchaser for real estate performs his contract and is entitled to his commission when he produces a person ready, willing, and able to purchase upon the terms specified by the owner in the brokerage contract. It is conceded, however, that the rule is different where the employment of the broker is "to sell." It is said that *Pederson v. Johnson,* 169 Wis. 320, 172 N. W. 723, so holds. The question there was whether the broker was entitled as against the owner, his principal, to $1,000 earnest money paid by a prospective buyer upon an option agreement given to such prospective buyer by the agent in the name of his principal which was not carried out by the prospective buyer. In the opinion it

is said that "the defendant never sold the premises and never became entitled to any commission." The question whether he would have been entitled to a commission had he produced a buyer ready, willing, and able to take the land upon the terms specified by the owner was not considered for the reason that his prospective purchaser did not perform the contract of purchase and no sale of the premises was ever consummated. By the great weight of authority the words "to sell" or "to procure a purchaser" are synonymous terms when used in a real-estate brokerage contract or listing agreement. *Carstens v. McReavy,* 1 Wash. 359, 25 Pac. 471; *York v. Nash,* 42 Oreg. 321, 71 Pac. 59; *Armstrong v. Lowe,* 76 Cal. 616, 18 Pac. 758; *Lindley v. Keim,* 54 N. J. Eq. 418, 34 Atl. 1073; *Morris v. Ruddy,* 20 N. J. Eq. 236; *Stengel v. Sergeant,* 74 N. J. Eq. 20, 68 Atl. 1106; *Jones v. Howard,* 234 Ill. 404, 84 N. E. 1041; *Lichty v. Daggett,* 23 S. Dak. 380, 121 N. W. 862; *Keim v. Lindley* (N. J.) 30 Atl. 1063. The authority conferred upon a broker by such an agreement which employs him "to sell" does not authorize him either to execute a conveyance of the premises or to enter into an agreement to convey. The bare authority "to sell" is not regarded as sufficiently specific to authorize the execution either of a conveyance or of a contract to convey, and it is generally held that under such an employment the owner reserves the right to close the deal and to arrange the details of the contract. See authorities above cited. The reason given by the courts for such construction is that the owner may not care to deal with the prospective purchaser at all. He may consider him undesirable as a neighbor and pecuniarily unable to comply with the contract. He may decline to bind himself to convey to such purchaser at the end of the time necessary to examine the title because he might thereby in the meantime lose an opportunity to sell to some other person in whose good faith and ability to pay he reposed entire confidence. Then, too, the delivery of possession is to be settled; generally, the title is to be examined,

and the conveyance, with the covenants, to be agreed upon and executed by the owner. All these are matters which the owner has a right to consider in determining whether he will deal with the prospective purchaser, and he will not be held to have surrendered such right by a mere naked authority conferred upon such agent "to sell" the real estate. If it be intended to confer upon the broker power to bind the owner by an agreement to convey, it should be accomplished by definite and specific language and should not be inferred from the mere authority to sell.

It thus appears that an agent or broker employed to sell land not only fully performs his contract but exhausts his authority when he produces a purchaser ready, willing, and able to buy upon the terms specified by the owner, or with whom the owner is able to make a deal when he has not specified definite terms in the listing contract, as where a trade or exchange of lands is in contemplation, and, as a consequence, when he has done this he is entitled to his commission. It follows that the plaintiff, though employed to sell the land, fully performed his contract and is entitled to recover the amount of the stipulated commission.

It may be thought that the case of *Brown v. Griswold,* 109 Wis. 275, 284, 85 N. W. 363, is in conflict with this rule. That case merely held that an agent could be authorized by parol to make a written contract for the sale of lands. The troublesome question in the case was one of fact, whether such authority had in fact been conferred upon the agent. It was not held in that case that the mere employment of a broker to sell real estate conferred upon him authority to bind his principal by a written contract of sale, but the holding was that under the terms of the employment in that case the agent was authorized to bind the principal by a contract of sale.

By the Court.—Judgment affirmed.

WILLIAMS and others, Appellants, vs. JONES and another, Respondents.

October 21—November 15, 1921.

Mortgages: Mortgagees as joint tenants or tenants in common: Intention of parties: Evidence.

The statutes (secs. 2068 and 2069) leave open to inquiry in each case whether a real-estate mortgage, joint in form, was intended to create a joint tenancy or a tenancy in common between the mortgagees; and the facts and circumstances attendant upon the execution of the mortgage may be considered to ascertain the intent of the parties.

APPEAL from an order of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from that part of the order which overruled plaintiffs' demurrer to the answer of defendants *Ann Jones* and *John H. Jones.*

This action was brought to have adjudicated and determined the respective rights of the plaintiffs and the defendants *Ann Jones* and *John H. Jones* in a mortgage of $15,000 executed by the defendants Frank Visser and Emma Visser. The plaintiffs and Arthur Williams, now deceased, were brothers, and the defendants *Ann Jones* and *John H. Jones* are the residuary legatees of the estate of Arthur Williams, deceased, and as such claim an interest in the note and mortgage in question.

The complaint alleges that on June 6, 1919, for value received, the defendants Frank Visser and Emma Visser, his wife, executed and delivered to the plaintiffs and Arthur Williams their promissory note in the sum of $15,000, payable October 1, 1924; that as collateral security for said note Frank and Emma Visser executed and delivered to the plaintiffs and Arthur Williams a mortgage on certain real estate; that Arthur Williams died on June 8, 1920, being entitled during his lifetime to a right of survivorship as joint tenant with plaintiffs in said note and mortgage; that he left a will

which has been duly probated, which, after providing for the payment of his debts and a small legacy, devises and bequeaths all of his property to the defendants *John H.* and *Ann Jones,* or the survivor of them; that the estate has been fully settled and the residue assigned to the defendants; that in the inventory of the estate there is listed as belonging to the estate an undivided one-quarter interest in and to the said note and mortgage; that defendants claim to be the owners of an undivided one-quarter interest in the note and mortgage as such residuary legatees; that the right, title, and interest of Arthur Williams in this note was extinguished by his death, and that his interest, not having been transferred by him during his lifetime, passed to his brothers on his death; that plaintiffs are now the sole owners of the note and mortgage; and that a substantial controversy exists entitling plaintiffs to ask for the relief prayed for in the complaint.

Defendants set forth in their answer that prior to the execution of the mortgage plaintiffs and Arthur Williams, who were brothers, were owners as tenants in common of the lands described therein; that the executors of the estate of their father contracted for the conveyance thereof to defendants Visser, and an action was brought by plaintiffs and Arthur Williams to cancel such contract; that such action was settled by a written stipulation which provides for a further payment on the purchase price, an increase in interest, the execution of a deed by plaintiffs and Arthur Williams to the purchaser, and the execution by him of a note for the balance of the purchase price, such note to be secured by mortgage upon the lands, the note to bear interest at five per cent., but as a part of such stipulation the plaintiff *William G. Williams* was to pay to the purchaser an amount equal to one fourth of one per cent. for the time the mortgage was to run, so that as a result the amount which he would receive was actually less than that of the other brothers; that such stipulation and the note and mortgage executed pursuant thereto were so executed with the intent

and understanding that the interest of plaintiffs and Arthur Williams in the latter would be of the same character, nature, and extent as was their respective interest in the land sold by them and described in the mortgage, namely, an estate in common; that up to the time the action in question was commenced plaintiffs so regarded the effect of the transaction and divided with defendants *Jones* the interest accruing and paid on the mortgage after Arthur Williams' death; that at the time the stipulation, note, and mortgage were executed plaintiffs and Arthur Williams were unfriendly and he intended that they would not receive any of his property upon his death and had executed a will for the purpose of accomplishing such result; that it was the mutual intent, purpose, and understanding of the parties that upon the death of any of the plaintiffs the interest of such plaintiff should not pass to or vest in the survivors of Arthur Williams, and that upon the death of Arthur Williams his interest should not vest in plaintiffs or any of them; that when Arthur Williams' will was offered for probate plaintiffs at first objected thereto, but later abandoned such contest; that, knowing that defendants *Jones* claimed a one-quarter interest in the mortgage and that it had been inventoried as part of the estate of Arthur Williams, plaintiffs suffered and permitted the probate of such estate to proceed to final settlement, with the allowance of inheritance taxes, fees, and expenses, in amounts commensurate with and as required on the basis of a valuation including a one-fourth interest in such mortgage; that through such silence and acquiescence plaintiffs caused and permitted defendants to materially alter their position to their prejudice in reliance upon such one-fourth interest; that for such reason plaintiffs are estopped to question or assert title to such one-fourth interest.

It is further alleged that, upon proceedings duly and regularly had in the county court of Columbia county in the matter of the estate of Arthur Williams, it was finally adjudged and determined that defendants *Jones* were the

owners of this one-fourth interest, and that such interest was duly assigned and set over to them by the final judgment of the court; that when the plaintiffs were parties in interest in said proceedings and actually appeared therein by filing objections to the probate of the will, such judgment of the county court of Columbia county is therefore conclusive and binding upon them.

As a counterclaim the defendants allege all of the facts stated in the defensive part of the answer and that if the note and mortgage, or the stipulation pursuant to which they were executed, are not in present form capable of being construed as creating a tenancy in common between plaintiffs and Arthur Williams, then that they should be reformed so as to express the true intent and understanding of the parties thereto. Relief was demanded on such counterclaim.

Plaintiffs demurred to the answer on the ground that upon the face thereof it does not state facts sufficient to constitute a defense; they demurred to the counterclaim on the ground that it does not state facts sufficient to constitute a counterclaim.

The demurrer to the answer was overruled by the court and sustained as to the counterclaim. Plaintiffs appeal from that portion of the order which overrules the demurrer to the answer. Respondents ask for a review of that part of the order which sustains the demurrer to the counterclaim.

For the appellants there was a brief by *Lueck, Clark & Lueck* of Beaver Dam, and oral argument by *Martin L. Lueck.*

For the respondents there was a brief by *Grady & Farnsworth* of Portage, and oral argument by *W. H. Farnsworth.*

SIEBECKER, C. J. It is claimed by the plaintiffs that this note and mortgage given to the plaintiffs and Arthur Williams, being joint in form, must therefore be held as creating a joint tenancy, and that the facts and circumstances of the transaction resulting in their execution and delivery cannot

be considered nor received in evidence as showing that the note and mortgage were intended to, and did in fact, create a tenancy in common between the plaintiffs and Arthur Williams. This claim of the plaintiffs is based on the statutes (sec. 2068 and 2069).

"Sec. 2068. All grants and devises of land made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

"Sec. 2069. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife."

It is urged that the common-law rule to the effect that written instruments cannot be contradicted, varied, or modified by parol evidence applies and governs in this case, and hence the facts and circumstances of the transaction resulting in the making, execution, and delivery of these written instruments cannot be considered in interpreting them and in determining the nature and kind of interest the plaintiffs and Arthur Williams had in them, and that, since they are in fact joint in form, under the statutes above quoted it must be held that the plaintiffs and Arthur Williams owned the note and mortgage as joint tenants, and upon the death of Arthur Williams the plaintiffs became the joint owners thereof by right of survivorship. It is also contended that under the decisions of this court, since the covenants of these instruments are joint in form, the facts and circumstances cannot be inquired into to interpret them and that they must be held to create a joint tenancy. The following cases cited to our attention are much relied on by the parties to sustain their respective claims: *Farr v. Trustees, etc.* 83 Wis. 446, 53 N. W. 738; *Fiedler v. Howard,* 99 Wis. 388, 75 N. W. 163; *Church v. Nash,* 163 Wis. 424, 158 N. W. 89; *Dupont v. Jonet,* 165 Wis. 554, 162 N. W. 664; *Farwell v. Warren,* 76 Wis. 527, 45 N. W. 217.

An examination of these cases discloses that this court has not declared that the facts and circumstances of the transactions involved in the making and execution of the written instruments respectively involved in each of these cases cannot be taken into consideration in interpreting the instruments. But it does appear in each of these cases that the facts and circumstances involved in the transactions that led to the execution of the respective writings were brought to the attention of the court and that they were taken into consideration in the decisions. An examination of the cases of *Farr v. Trustees, etc., Fiedler v. Howard, Church v. Nash,* and *Dupont v. Jonet* shows that the joint covenants there involved, when interpreted in the light of the subject matter upon which they operated, with reference to the nature of the transactions between the parties, were intended to be joint covenants as held by the court. In the case of *Farwell v. Warren,* 76 Wis. 527, 45 N. W. 217, where a chattel mortgage was given, joint in form, to secure the separate indebtedness of the mortgagor to each mortgagee, it was held that the mortgagees took as tenants in common of the property, each having an undivided interest in the property to the amount of his claim. It was there urged upon the court that, since the mortgage was in form joint, the mortgagees had a joint interest therein; but the court held that although the form of the mortgage was joint it was clear from the whole mortgage that the mortgagees owned it in common and that each mortgagee had an undivided interest in proportion to his respective debt. To this proposition the court cites a number of cases on page 535 of the opinion written for the court by Mr. Justice TAYLOR. Among the cases thus cited by the court is the case of *Burnett v. Pratt,* 22 Pick. 556. An examination of this case discloses that it involved a consideration of the questions presented on this appeal. The Massachusetts statutes, which are in substance like secs. 2068 and 2069 of our statutes, were involved in the decision. Since *Burnett v. Pratt* was approved and fol-

lowed in *Farwell v. Warren,* 76 Wis. 527, 45 N. W. 217, and the principles there enunciated dealt with rights of parties like those involved in the instant case, we deem it proper to refer to the reasons and grounds therein stated as declaratory of doctrines which we deem applicable to this case. It is there declared:

"A covenant with two or more persons constitutes a joint obligation; and a conveyance in fee or in mortgage to several, at common law, creates a joint tenancy. But covenants are to be construed with reference to the subject matter upon which they are to operate, and where the interests of the covenantees are *several,* the covenant, though in form *joint,* shall be construed to be *several.* . . .

"Every written agreement should be construed with reference to the nature of the transaction between the parties and to the objects which they appear to have in view. . . . If a mortgage be given to secure a joint debt, it shall be so construed as to create a joint estate, notwithstanding the provisions of our statute. . . . But if a mortgage be given to two or more persons to secure their several debts, the obvious purpose of the parties must be to give to each security for his particular debt."

This doctrine as quoted was sustained in the common law, as pointed out in the *Burnett Case.* In the recent case of *Park v. Parker,* 216 Mass. 405, 103 N. E. 936, the court re-examined the subject and the doctrine of the *Burnett Case* is adhered to. We consider that the observations of the Massachusetts court are pertinent and applicable in interpreting instruments within the provisions of secs. 2068 and 2069, Stats. It is considered that the circuit court properly held that a mortgage given under the facts and circumstances alleged in the answer makes it proper to consider such facts and circumstances to show the intent of the parties. The statutes leave open to inquiry in each particular case what the intent of the parties is, and the rights of the parties are to be governed by the transactions involved and the nature of the subject matter upon which they operate.

It must be held that the circuit court properly overruled plaintiffs' demurrer to defendants' answer, and correctly held reformation of the mortgage is not necessary, and hence the demurrer to the counterclaim should be sustained.

By the Court.—The order appealed from is affirmed.

NELSON, Appellant, vs. CITY OF EAU CLAIRE, Respondent.

October 21—November 15, 1921.

Municipal corporations: Construction contracts: Damages due to delay of city: Extras: Written order and claim: Waiver: Bad faith of engineer: Pleading: Demurrer: Appeal from disallowance of claim by city: Bond: Sufficiency: Jurisdiction of court: Amendment of complaint.

1. Where a cause of action sets out numerous items for which recovery is sought, if any of them are well pleaded a general demurrer thereto should not be sustained.
2. A provision in a contract with a city for the removal of a bridge that "no charge made by the contractor for any delays or hindrances from any cause during the progress of the work or any portion thereof embraced in the contract will be allowed," is construed to cover delay occasioned by the city's failure to remove street-car tracks and gas mains before the work began.
3. A municipal contractor was not entitled to charge for extras where he did not make claims therefor before the payment of the next succeeding estimate, where the contract provided that "No extra work will be paid for or allowed unless the same was done upon the written order of the engineer. . . . All claims for extra work must be made to the engineer in writing before the payment of the next succeeding estimate, . . . and failing to do this the contractor shall be considered as having abandoned his claim."
4. An engineer who had only the powers of a superintending engineer, even if he could waive written orders for extras, could not waive seasonable claims therefor, as the city council, which was to pass on the claims, was entitled to the written notice provided in the contract. *First Savings & Trust Co. v. Milwaukee Co.* 158 Wis. 207, distinguished.

5. Where the contract provided that the contractor should be subject to the orders of the engineer and to the construction given by him to the plans and specifications, the contractor is entitled to recover damages proximately sustained by reason of the bad faith or inexcusable ignorance of the engineer, where he relied in good faith upon his directions.
6. Under sec. 2647, Stats., a second cause of action should state a cause of action separately.
7. A bond on appeal to the circuit court from the disallowance of plaintiff's claim by the common council of the city of Eau Claire, conditioned "for the faithful prosecution of said appeal, and the payment of all costs as should be adjudged against this plaintiff by said circuit court," was defective.
8. A demurrer to a cause of action reaches all defects appearing upon the face of the complaint, including allegations as to the kind of bond that was given upon an appeal to the circuit court from the disallowance of plaintiff's claim by the city council; and such allegations cannot be aided by extrinsic facts, even though they appear in the record, under secs. 2649, 2836*a*, Stats.
9. If a void bond was given on appeal to the circuit court from the disallowance of plaintiff's claim, such court obtained no jurisdiction, and a demurrer on that ground was well taken.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Judge. *Affirmed in part; reversed in part.*

Action by a contractor to recover in the first cause of action for extras ordered in the construction of a concrete bridge over the Eau Claire river in the city of *Eau Claire*, for damages sustained by reason of the alleged failure of the city to remove the street-car tracks and gas mains on the old bridge, and for damages caused by the alleged bad-faith action and ignorance of the engineer in charge of the construction on behalf of the city.

In the second cause of action compensation is sought for the rent of a concrete mixer used by the city and for the value of a smokestack belonging to the plaintiff which it is alleged the city converted to its own use.

The amended complaint sets out the contract and plans and specifications for the building of the bridge.

The defendant demurred to the first cause of action on

the ground that it did not state facts sufficient to constitute a cause of action and it entered a like demurrer to the second cause of action, and a further demurrer to the effect that the court had no jurisdiction thereof.

The trial court sustained the demurrers to both causes of action and the plaintiff appealed.

For the appellant there was a brief by *M. B. Olbrich, Timothy Brown,* and *Lee L. Siebecker,* all of Madison, and oral argument by *Mr. Brown.*

For the respondent there was a brief by *John B. Fleming,* corporation counsel, and *A. H. Shoemaker,* both of Eau Claire, and oral argument by *Mr. Shoemaker.*

VINJE, J. The first cause of action sets out numerous items for which recovery is sought, and it is elementary that if any of them are well pleaded a general demurrer thereto should not be sustained.

The allegations in the complaint in reference to the duty of the city to cause the removal of the street-car tracks and gas mains are to the effect that both the street car company and the gas company operated under franchises from the city and that therefore, under the terms of the contract and by virtue of the franchises, it became the duty of the city to cause the removal of the street-car tracks and gas mains from the old bridge, which it is conceded it was the duty of the plaintiff to remove. It is alleged that finally, after a delay of eleven days, the street-car track was caused by the city to be removed, and after a delay of four days more the gas mains were caused to be removed. It is also alleged that the plaintiff, pursuant to notice by the city to commence work April 1, 1915, was prepared to do so, that he had procured material, hired men, and was in readiness to proceed with the work, but was delayed because of the failure of the city to seasonably require the removal of the street-car tracks and gas mains, to his damage in all in the sum of $1,500.

Conceding for the purpose of the case that it was the duty

of the city to cause the removal of the tracks and mains, the question recurs, Can plaintiff, under the terms of his contract, recover?

Paragraph 14 of the contract provides, among other things, that "no charge made by the contractor for any delays or hindrances from any cause during the progress of the work or any portion thereof, embraced in the contract, will be allowed. If the delay be caused by any act or neglect of the city, then he will be entitled to an extension of the time allowed for the completion of the work, sufficient to compensate for the delay, to be determined by the engineer, provided the contractor shall give the engineer immediate notice of the cause."

It is claimed by plaintiff that this provision of the contract does not relate to the delay charged because it was not a delay during the progress of the work but a delay before the work began. We cannot concur in such a construction. The provision was no doubt intended to cover all delays under the contract of employment—all delays which grew out of the relations created by the contract between the parties. A delay at the inception of the work must be deemed a delay during the progress thereof, for, according to plaintiff's allegations, activities under the contract had already been begun—materials procured, men hired, and plaintiff in readiness to begin the removal of the old bridge. Under the provisions of the contract an extension of time was all plaintiff was entitled to for the delay, and that only upon giving the required notice of the cause. So we conclude the demurrer was properly sustained as to this claim for damages.

The claim for extras we deem was properly held demurrable under the pleadings and the terms of the contract, which provided with reference thereto that "no extra work will be paid for or allowed unless the same was done upon the written order of the engineer. . . . All claims for extra work must be made to the engineer in writing before the

payment of the next succeeding estimate after the work shall have been performed, and failing to do this the contractor shall be considered as having abandoned his claim." There is no allegation that the extras were furnished upon the written order of the engineer, or that claims were made in writing therefor as provided for in the contract, so we must treat them as having been furnished without complying with this part of the contract.

Plaintiff relies largely upon the case of *First Sav. & T. Co. v. Milwaukee Co.* 158 Wis. 207, 148 N. W. 22, 1093, to sustain his contention that the provision in the contract that extras should be paid for only when ordered in writing by the engineer might be waived. There are several differences between this case and the one cited. There the committee in charge of the work on behalf of the county were delegated plenary powers to act in the matter, and there was no provision for written claim for extras to be made before the payment of the next estimate. Here the engineer in charge had only the usual powers of a superintending engineer in such cases, and if it be conceded that he might waive written orders for extras it is clear he had no power to waive seasonable written claims therefor. The city council must pass upon such claims and it was entitled to the written notice provided for by the contract. Failing to give such notice the contractor must, under the terms of his contract, be "considered as having abandoned his claim."

We come now to a class of items of damages which it is alleged were suffered by plaintiff by reason of the bad faith, fraud, or inexcusable ignorance of the engineer employed by the city. Of this class is the item of $1,200 for delays caused by the engineer set out in paragraph IV of the complaint; the item of $2,700 for damages alleged to have been caused by orders to continue to drive piles; the item of $780 alleged to have been caused by the mistake of the engineer in setting grade stakes for the south abutment of the bridge; the item of $1,689 for change in concrete arches caused by

the alleged inexcusable ignorance of the engineer; the item of $125 for change in the balustrades caused by the alleged inexcusable ignorance of the engineer; and the item of $700 for change in steel stirrups claimed to have been made by the engineer either in bad faith or through mistake.

While the contract provides in effect that the contractor shall be subject to the orders of the engineer and to the construction he gives to the plans and specifications, that does not mean he has no recourse where bad faith or inexcusable ignorance is shown by the engineer resulting in damage to the contractor. *First Sav. & T. Co. v. Milwaukee Co.* 158 Wis. 207, 148 N. W. 22, 1093. Such provisions in contracts like the one in question imply that the engineer shall act in good faith and that he is possessed of a reasonable degree of skill and care and will in good faith exercise the same in giving orders and in performing his part of the contract. Where bad faith or inexcusable ignorance on his part is shown to have resulted in damages to the contractor, who in good faith relied upon the directions of the engineer or upon the correctness of the work performed by him, then the contractor may recover the damage proximately sustained by him by reason of such bad faith or inexcusable ignorance. *First Sav. & T. Co. v. Milwaukee Co.* 158 Wis. 207, 148 N. W. 22, 1093. It is therefore held that the trial court erred in sustaining the demurrer to these alleged items of damage set out in the first cause of action.

The demurrer to the second cause of action was properly sustained, first because it does not state a cause of action, separately, as required by the statute (sec. 2647, Stats. 1919), and second, if recourse is had to the first cause of action by virtue of the expressions "as above set forth," then it appears that no proper bond upon appeal was given, for the complaint alleges an appeal to the circuit court for Eau Claire county was taken from the disallowance of plaintiff's claim by the city council of *Eau Claire* and that a bond was executed conditioned "for the faithful prosecution

of said appeal, and the payment of all costs that should be adjudged against this plaintiff by *said circuit court.*" Under the rule established in *Drinkwine v. Eau Claire,* 83 Wis. 428, 53 N. W. 673, this is a defective bond. The bond was executed in 1907 before the enactment of sec. 2836*a,* Stats., in 1915. If the information stated upon the oral argument is true, that the bond given is in fact a good bond and that there is a mistake made in the allegations of the complaint, then sec. 2836*a* would not avail because there would be nothing to correct except as to the allegations in the complaint. Those could not be corrected by virtue of the statute or otherwise, for upon demurrer they are taken as true. And under the statutory rule (sec. 2649, Stats. 1919) that a demurrer reaches all defects appearing upon the face of the complaint, it reaches the allegations as to the kind of bond that was given upon the appeal to the circuit court. Such allegations cannot be aided by extrinsic facts even though they appear in the record. *Zægel v. Kuster,* 51 Wis. 31, 41, 7 N. W. 781; *Benedix v. German Ins. Co.* 78 Wis. 77, 80, 47 N. W. 176. If a void bond was given, as alleged, the circuit court obtained no jurisdiction nor did this court, and the demurrer on that ground was well taken. If a good bond was in fact given, the complaint can be amended and a complete second cause of action stated.

By the Court.—Order affirmed in part and reversed in part, as indicated in the opinion, and cause remanded for further proceedings according to law, with costs in this court in favor of appellant.

SIEBECKER, C. J., took no part.

ROEHRBORN, Respondent, vs. CITY OF LADYSMITH, imp., Appellant.

October 21—November 15, 1921.

Municipal corporations: Annexation of territory: Publication of proposed ordinance: Consideration by council: Unreasonable delay: Sufficiency of ordinance: When validity of ordinance may be questioned.

1. An ordinance to annex certain territory to a city, adopted within thirty days after the introduction thereof, in violation of sec. 925—19, Stats. 1915, is absolutely void, though its validity is not questioned within the time limited by sec. 925—21, since the failure to so question cannot operate to validate a proceeding which is void and therefore without legal effect.
2. Where such ordinance was introduced pursuant to petition under secs. 925—17 *et seq.*, Stats. 1915, the city council was required to act on the ordinance within a reasonable time; but an interval of nine months between the publication of the ordinance and its adoption is *held* not to be such an unreasonable delay as to make the action of the council void.
3. A resolution of a city council "that the ordinance annexing the territory be adopted" sufficiently described the ordinance, where there was no other ordinance to which it could possibly have referred and where no one was misled by the failure to more specifically describe it.

APPEAL from a judgment of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Reversed.*

Proceedings were begun under the provisions of sec. 925—17 and following sections, Stats. 1915, by which it was sought to detach certain territory from the town of Flambeau and attach it to the city of *Ladysmith,* a city of the fourth class operating under the general charter law.

A petition in compliance with the statute was duly filed, and at a regular meeting of the common council thereafter an ordinance was introduced which was published four successive weeks in accordance with the provisions of sec. 925—19, Stats. This section provides:

"Final action on said ordinance shall not be taken except

at a regular meeting of the council and not earlier than thirty days after the same is introduced."

The petition was filed May 29, 1916. On June 6, 1916, at a regular meeting, the proper resolution was introduced, and the proposed ordinance was published as required by the statute. On July 5, 1916, the council adopted a resolution in terms adopting the ordinance relating to the proposed annexation.

It will be seen that the action of the council adopting the ordinance on July 5th was premature, it being one day earlier than thirty days after it was introduced. Nothing further was done until May 1, 1917, and on that day the council adopted a resolution purporting to adopt again the ordinance, which was thereafter duly published in the official paper of the city and recorded in the ordinance book of the city.

Upon the trial the court found:

"That during the years 1916 and 1917 the taxing officers of the town of Flambeau and the city of *Ladysmith* each assessed the property in said territory attempted to be attached to said city and both of said municipalities collected a portion of the taxes in said territory for said years."

The trial court was of the opinion that by the attempt to adopt the ordinance on the 5th day of July and in not taking further action in reference thereto within a reasonable time thereafter, persons in said territory were notified that no further action would be taken with reference to the proposed ordinance, and that the attempt to pass said ordinance on the 1st day of May, 1917, was in violation of law, and said ordinance was and is void and of no effect. There was a judgment in favor of the town of Flambeau, from which the city of *Ladysmith* appeals.

For the appellant there was a brief by *McGill & Williams* and *Charles Kirwan,* all of Ladysmith, and oral argument by *Mr. Kirwan* and *Mr. L. E. McGill.*

For the respondent there was a brief by *Coe Brothers* of Barron, and oral argument by *C. C. Coe.*

ROSENBERRY, J. It is contended on behalf of the appellant that even though the ordinance adopted July 5, 1916, was at a time prior to the expiration of thirty days from the date of its introduction, not having been drawn in question within the time limited by sec. 925—21, Stats., its validity cannot now be drawn in question. While the statute in terms does not require the giving of a notice of the time and place when and where the proposed ordinance will be acted upon, nevertheless the purpose of the publication must be to advise those who are interested that the matter is before the common council for consideration. Within the doctrine laid down in *Herman v. Oconto,* 100 Wis. 391, 76 N. W. 364, the action of the council in attempting to adopt the proposed ordinance before the expiration of the thirty days must be held to be a nullity and to have no legal effect. There is language used in *Lutien v. Kewaunee,* 143 Wis. 242, at page 247 (126 N. W. 662, 127 N. W. 942), which, if not read in connection with the facts in that case, might warrant the conclusion that a statute limiting the time within which the validity of the ordinance may be called in question would operate to make its adoption valid though no publication had been had. It is there said:

"But ninety days after such ordinance is adopted the time for calling it in question expires whether publication is defective or not, and even if no publication has taken place."

The publication there referred to is not the publication of the ordinance required to be made before it is acted upon by the council, but is the publication of the ordinance required to be made after its adoption. A statute limiting the time within which the validity of the ordinance may be called in question cannot operate to give vitality to a proceeding which is void and therefore without legal effect.

The question then arises whether or not the action taken

by the council on May 1, 1917, adopting the ordinance is valid. The trial court was of the opinion that it was invalid because the council had not acted within a reasonable time after the publication of the ordinance. The statute prescribing no time within which the ordinance must be acted upon, any limitation upon the power of the council in the premises must arise by implication of law. It is not to be supposed that the proceedings had which resulted in the publication of the ordinance would authorize the adoption of the ordinance two, or three, or five years after the time of its publication. We are of the opinion that the council is required to act within a reasonable time. Is a delay of nine months unreasonable? Upon this point we find very little, if any, help from the authorities. A much shorter time is prescribed by statute in many cases where local legislative and administrative bodies are required to act. While a delay of nine months is long and might permit the adoption of the ordinance without those interested having notice, nevertheless we do not feel that we can say that such an unreasonable length of time had elapsed as to make the action of the council void. We must hold, therefore, that the ordinance was legally adopted and is in full force and effect, that the territory sought to be attached to the city of *Ladysmith* is a part of that city, and that the city is entitled to judgment accordingly.

It is contended that the ordinance was not sufficiently described in the resolution which in terms adopted the ordinance. It is clear that no one was misled in this matter—that no other ordinance by any possibility could have been referred to. The language of the resolution was "that the ordinance annexing the territory be adopted." Under the facts shown in this case we think this a sufficient reference.

Other questions discussed become immaterial in the view which we take of the case.

By the Court.—Judgment reversed, with directions to the trial court to proceed as indicated in the opinion.

LAMBERSON, Respondent, vs. LAMBERSON and others, Appellants.

June 1—December 13, 1921.

Specific performance: Land contract of father to son: Evidence: Sufficiency: Witnesses: Competency: Transactions with deceased persons: Waiver of incompetency: Opening door: Adverse examination: Use: Appeal: Findings not essential to judgment.

1. In an action to compel the conveyance by the executor of land deeded to plaintiff by decedent, his father, where plaintiff was fully examined under sec. 4096, Stats., before trial and cross-examined at the trial as to portions of such examination, and defendants made his deposition a part of the record without qualification, plaintiff's testimony therein concerning transactions with deceased became admissible.
2. While an adverse examination is not a part of the record until offered, the party taking it may offer it, whether the party examined be present or not (sub. 2, sec. 4096, Stats.); and though it cannot be offered by the party whose deposition is taken, it may be used by him when offered as evidence for the other party, as though he were called in rebuttal to testify concerning transactions therein testified to.
3. The evidence in this case is *held* sufficient, in view of the relations shown to have existed between the father and the son, to support a finding that plaintiff and decedent signed a land contract covering the property in question, that its terms were substantially as testified to, and that it was intended to vest title in plaintiff, though the latter did not take possession, demanded no accounting, and made no assertion of ownership during his father's life.
4. Findings not essential to support the judgment may be disregarded.
5. Evidence as to the relationship between the parties, the understanding of members of the family that plaintiff was not physically fitted to manage a farm, that he was occupied in other pursuits with the approval and consent of his parents, that his father was able to supervise the management of the farm and arranged to have it conducted by plaintiff's brothers or their sons, together with plaintiff's natural hesitancy, in such circumstances, to deal with his father on a strictly business basis, is *held* to justify the conclusion of the trial court that he did not abandon his rights under the contract, though he did not occupy and manage the farm.

SIEBECKER, C. J., and OWEN, J., dissent.

APPEAL from a judgment of the circuit court for Trempealeau county: LEVI H. BANCROFT, Judge. *Affirmed.*

The plaintiff brought this action to compel conveyance to him of a certain farm of 160 acres in Trempealeau county, Wisconsin, and also to compel an accounting for the profits from the same accruing during the lifetime of his father, the alleged grantor, and from the defendant *Alfred Lamberson,* who as executor of the father's estate had subsequently retained possession. The trial was had before the Hon. GEORGE CLEMENTSON, to whom the case had been transferred, and upon his death prior to its determination, by stipulation, the record was submitted to and a decision made thereon by Judge CLEMENTSON's successor, Hon. LEVI H. BANCROFT.

The question of accounting under the second cause of action was sent to a referee for hearing, and upon stipulation by the parties there a determination was had that the debits and credits on any such accounting were equal and no amount due either party from the other in such matter. Such finding of the referee was confirmed by the judgment herein.

John C. Lamberson owned and managed considerable farm property in the neighborhood of Whitehall in said Trempealeau county. His family consisted of his wife and four children, in the order of their ages as follows: *Alfred,* Bernice Lowe, *George,* and *Lloyd. Lloyd* was the only minor and about nineteen years of age in December, 1901, and then living with his parents. In November, 1901, John C. Lamberson was stricken with what appeared to have been some trouble with his heart, from which he recovered shortly thereafter to a considerable extent, yet he never thereafter carried on the active management of his property. A short time thereafter he gave up his home at Whitehall, purchased a homestead at Winona, Minnesota, and resided there with his wife until his death in 1917. From about the 1st of December, 1901, and during substantially the whole of said month he gave considerable and serious consideration to the matter of disposing of his property interests in case of his

death. He consulted with Mr. Ekern, then practicing law at Whitehall, and numerous drafts were prepared by Mr. Ekern of land contracts as to certain real estate and also forms of wills. The record does not disclose which, if any, of such proposed wills were signed by him at that time.

He submitted to the three older children some at least of such proposed land contracts and wills and invited suggestions from such children with reference to their contents. He had in April, 1897, conveyed to the second son, *George,* a farm, the deed therefor placed in escrow with a bank at Whitehall, which was not to be delivered to *George* until after the death of the father. It remained there until after the father's death and was then recorded. This conveyance was expressly referred to in the several drafts of subsequent wills and expressly confirmed and ratified in the probated will of Mr. Lamberson made in 1915.

In December, 1901, it appears that he had left three farms, one of which consisted of about 160 acres, forty acres of which had formerly belonged to a man by the name of Daggett and 120 to a man named Dowd, and which was designated at times by Mr. Lamberson and the family as the Dowd-Daggett farm, which is the one here involved.

Some question was raised on the trial as to whether Mr. Lamberson owned the entire interest in this property in December, 1901, but it is not deemed material in the disposition of this case, for it is alleged in the complaint and admitted in the answer that he was, at the time of the transaction here involved, the owner of said farm.

On December *24,* 1901, Mr. and Mrs. Lamberson signed and acknowledged two copies each of land contracts to the sons *George* and *Alfred,* respectively, of two of the three several farms. One land contract was written out in full in typewriting, the other was on a printed blank, filled in by typewriting, and each set dated as of December *18th.* Each fixed a purchase price for the respective pieces, with a provision that the payment of the substantial part of such

purchase price was not to be made until after the death of the father, and provided for annual payments of interest during his lifetime at a rate of approximately three per cent.

Alfred and *George* entered into possession of such farms and continued to hold the same until the death of the father. Such land contracts were not recorded during the father's lifetime. One copy of the land contract to *George* was kept by him, and both copies, the one in *George's* and the one in the father's possession, had indorsed upon the backs thereof the payments made from time to time of the interest. The typewritten duplicates of the land contract to *Alfred* were both kept by the father in the bank with his other papers and to which it appears *Alfred* also had access. The indorsements of payments were made on but one of these land contracts.

After the death of the father there was found among his papers a land contract with the plaintiff's name as grantee and which had been signed by the father and mother. This was taken with other papers by the son *Alfred* and placed in a box in the vault in the bank at Whitehall, and, as appears from his testimony, upon making a search therefor at his mother's request some ten days or two weeks subsequently he was unable to find the same and it was not produced at the trial. Due notice to produce the same was given on behalf of the plaintiff to defendants prior to the trial.

The mother, widow of John C. Lamberson, testified that she did, on December 23, 1901, with her husband, sign a land contract of the 160 acres in which the son *Lloyd's* name appeared as grantee. She testified that she neither saw it signed by *Lloyd* nor delivered to him, he coming into Mr. Ekern's office, where the various transactions were had, just as she was leaving.

The plaintiff never took possession of this farm or assumed any direction with reference to its management and never demanded any accounting as to its proceeds during his father's lifetime. The relationship between the father and

the three sons continued to be always friendly. The plaintiff, apparently with his parents' consent, was taking a course in a business college at about the time of the transaction, was subsequently in the harness business at Whitehall, and traded the same for a farm in the northern part of the state, but never undertook to run the same, and was subsequently and up to the father's death and thereafter employed as an accountant for the Studebaker corporation in Indiana, where he was living at the time of the trial.

This particular farm was for one season rented to the husband of Mrs. Lamberson's daughter by a former marriage. Thereafter and until the death of the father it was rented on shares by the sons *Alfred* and *George* or their respective sons. Accounts appear to have been kept by the father during the balance of his life as to the transactions with reference to this particular farm and accounts stated by him from time to time with reference to the charges, expenses, and proceeds thereof. In such of the statements as are in evidence it appeared that it was therein designated by the deceased under the term "Dowd" or "Daggett" farm. No writing was produced in which the deceased designated it as belonging to *Lloyd* or appeared to keep an account of it with him.

In one of the drafts of his proposed will drawn in December, 1901, and preserved in Mr. Ekern's files, he speaks of three land contracts to the three sons, naming them. In 1915, apparently upon ascertaining that he was then suffering from cancer, he executed his last will, subsequently admitted to probate, in which he specifically devises this particular 160-acre farm to the son *George* subject to a charge of $7,000, making no reference to any possible interest of *Lloyd* in the same. The general nature of this will appears to have been known at about the time of its execution to the sons *Alfred* and *George*. Neither his wife nor daughter, however, had any information concerning the

same prior to his death as they had of his proposed wills in 1901.

The daughter, Mrs. Lowe, testified to her father having brought to her in the early part of December, 1901, three proposed forms of land contracts unsigned and also of a will, that she and her father read them over at the time and discussed them, and particularly the contract for *Lloyd,* and that in the form of will shown her at that time the fact of the execution of three land contracts was expressly mentioned; that she was asked by her father to discuss the various documents with her husband and write fully her opinion. She did so write him a letter in the record, of December 9, 1901. She further testified that on New Year's day following her father came to her house and stated to her: "I have got those papers all signed up now and everything is finished and it doesn't make any difference whether I am dead or alive." That at the time of the first interview he expressed himself as not intending that *Lloyd* should go on the farm owing to *Lloyd's* condition of health and that he could do better at some other kind of work, and that he, the father, could just as well manage the place, the other two boys living right near there.

On Mrs. Lowe's cross-examination she was asked by defendants' counsel as to whether she knew that there was a contract signed by *Lloyd,* and the following took place:

"*A.* My father said it was signed. That is all I know about it. *Q.* Simply said it was signed? *A.* Yes, he said it was signed and his business all completed. I have a letter in which he states that everything is done. *Q.* I am not asking for your letter now. *A.* All right." (No reference appears to have been subsequently made on the trial to this letter nor was it produced.)

She further testified on direct examination that a number of times subsequently he spoke of this farm as being *Lloyd's* place.

The mother also testified that it was referred to by the father between 1901 and 1907 as *Lloyd's* place. A lady who lived near the family in Winona, while visiting at Whitehall, was also told by the father that this farm was *Lloyd's* and that he had given three farms to his sons.

At the close of the oral testimony, when defendants' counsel stated that he was through with their part of the case, he also stated that there were certain depositions taken in the matter which were to be considered as in the case, plaintiff's counsel stating that it was the same for their side with examinations they had also taken. Defendants' counsel then stated that he referred to the deposition of Mrs. Lamberson, the widow, "the adverse examination of *Lloyd Lamberson,*" and other depositions. The court then ruled that all those are now introduced subject to any objections that could be now made. Defendants' counsel then announced that their case was closed.

The findings of fact by the trial court who determined the case, in substance, so far as being material on this appeal, were to the effect that the land contract as alleged by the plaintiff was executed by the deceased and his wife December 23, 1901;

The death of John C. Lamberson leaving a last will which was duly admitted to probate and the devising therein of the lands in question to the defendant *George Lamberson;*

That after the making of the contract of December 23, 1901, the original of said contract was by mutual consent left in the possession of John C. Lamberson;

That by mutual arrangement between the parties to such contract John C. Lamberson was left in possession and was to receive the rents and profits and pay the taxes and assessments and account to the plaintiff for any difference over and above such and the $125 annual payment specified in said contract;

The readiness and ability, during the lifetime of John C. Lamberson, of the plaintiff to pay anything that might be due from him on account of said contract and the same so

far as the executor is concerned, but that plaintiff was unable at any time, either from the said John C. Lamberson or his executor, to obtain any statement of account in such matter and has therefore been unable to pay the same;

That the plaintiff has demanded possession of the real estate and an accounting with the executor;

That there has been a refusal on the part of the executor to convey, and the defendant *George Lamberson* claims an interest in the said real estate under the will aforesaid;

That the contract has never been revoked or abandoned by the parties thereto and is still of force and effect.

As conclusions of law:

First, that the plaintiff is entitled to judgment for the immediate possession of the land;

Second, for an accounting;

Third, that the defendant *George Lamberson* is barred from all right, title, and interest in and to the real estate.

As appears from his memorandum decision, the trial court deciding the case considered the evidence of the plaintiff as to the execution of the contract by the deceased and in effect overruled the objection interposed by defendants to such testimony, but apparently on the ground that the proper objection had not been interposed.

From the judgment entered in favor of the plaintiff the defendants *Alfred Lamberson,* as executor, and *George Lamberson* have appealed.

For the appellants there was a brief by *Tawney, Smith & Tawney* of Winona, Minnesota, and *Ole J. Eggum* of Whitehall, and oral argument by *Mr. Eggum* and *Mr. W. J. Smith.*

For the respondent there was a brief by *Cowie & Hale* of La Crosse and *A. V. A. Peterson* of Whitehall, and oral argument by *Quincy H. Hale.*

The following opinion was filed October 18, 1921:

ESCHWEILER, J. Laying aside for the time consideration of the testimony of the plaintiff, there is ample evidence in

the record upon which the findings of the court can and should be upheld so far as they determine that a land contract for this farm of 160 acres was signed by John C. Lamberson and his wife on December 23, 1901, at Mr. Ekern's office at Whitehall and on an occasion when the plaintiff was at the same office. The testimony of Mrs. Lamberson was properly received, and without objection, to that effect. It also appears from defendants' own testimony that a land contract wherein *Lloyd Lamberson* was named as grantee and signed by John C. Lamberson and his wife was found among the father's papers in the safety-deposit box after his death. It therefore may be considered as conclusively shown that Mr. Lamberson, then evidently considering the future disposition of all of his property and giving by his land contracts of December 24th two of these three farms to *Alfred* and *George,* did on the preceding day go so far at least as to have reduced to writing and signed by himself and wife a land contract making the plaintiff the grantee, under substantially similar conditions, of the remainder of his real estate, the farm here involved. He had thus evidently by December 23d and 24th reached a definite and declared conclusion as to the disposition he wished to make of his property, and in accordance with the suggestions, in a general way at least, embodied in the forms of contracts and wills that had been submitted to the two older sons and the daughter and concerning which the advice of each of them had been sought. It negatively appears that *Lloyd,* the youngest, a minor and not deemed presently able to carry on farm work, was not consulted concerning the matter, although evidently the subject of the parents' solicitude and affection. As late as December 19th, in a letter to the son *Alfred,* the father says, "Look the contracts over and see if they are what you expected and let me know by return mail as *my will has got to be based on these contracts.*" No suggestion appears in the record that

any objection was made by any of the three older children to the fairness of the proposed division or the particular provision for *Lloyd.*

George testifies that he knew the father contemplated giving *Lloyd* the Dowd-Daggett farm about the time that his, *George's,* contract and *Alfred's* contract were made out. He also testifies that he saw all three contracts at about that time, that *Alfred's* was then executed, his was not, and *Lloyd's* was not. It is evident, however, from the face of the land contracts to *Alfred* and *George,* in each of which the date of acknowledgment of December 24th is written in with pen and ink rather than by typewriter, that he must be confused or mistaken as to the precise time when he saw these land contracts, because it is a verity that the contract to *Lloyd* was signed and preceding either of the others.

The preservation by the father of this signed land contract to his youngest son among his valuable papers rather than leaving them in Mr. Ekern's office files, as was the case with the drafts of the unexecuted wills and land contracts; the evident intention in December, 1901, of making a complete future disposition of all of his real property; the absence of anything showing that he was wavering in his mind as to whether he would give this 160-acre farm to either *Alfred* or *George* rather than to *Lloyd;* the disposition he was then making and did make for these two elder brothers; the fact that the only changes suggested during this period were more as to matters of detail than as to the general scheme; his stating to the daughter New Year's day that all was finished, are very persuasive in confirming the conclusion of the trial court that there was then a completed, effectuated disposition of all of his real property by the signing and acknowledging of three land contracts of equal force and validity, rather than, as contended by defendants, a halting by him after he and his wife had signed and acknowledged the land contract to *Lloyd* and thereby changing in such substantial

manner his general scheme for division and as against his youngest child and without any apparent cause for so excluding him.

The apparent assertion by the father in his last will, made in 1915, of a then contrary intent as to this farm by his devise thereof to *George,* can have no weight, therefore, in the disposition that must be made here of the rights of the plaintiff arising, if at all, by the transaction of December, 1901. *Jones v. Caird,* 153 Wis. 384, 386, 141 N. W. 228.

Considerable stress is laid by appellants upon the testimony of Mr. Ekern and his then stenographer to the effect that the copy of the signed land contract to the plaintiff which was found in the office files as late as 1919 was the original ribbon copy and the one which, under the custom of the office, would be the one to be signed by the parties, and upon the improbability of the sister, Mrs. Lowe, being able to recollect the description of the property covered by the land contract; but these are not of much significance in view of the undisputed fact that some form of a land contract was signed by Mr. and Mrs. Lamberson with *Lloyd* named as grantee, that Mrs. Lamberson knew that it was of this particular property, that it was subsequently so referred to by the father as being plaintiff's farm, and, perhaps what is more significant than all, that *Alfred Lamberson,* executor of the estate, the only one who saw the contract after the father's death, does not testify that such contract was not of this particular farm; also that there was no other real estate belonging to Mr. Lamberson at that time than this farm which was not then disposed of by deed or land contracts to the other sons.

Unless defendants have by their procedure on the trial waived the objection which was properly interposed under sec. 4069, Stats., as to the want of competency of *Lloyd* to testify to a transaction or communication with his father now deceased, his testimony as to the contents of the land contract of December 23, 1901, cannot be properly considered in this case. *Felz v. Estate of Felz,* 170 Wis. 550, 553,

174 N. W. 908. And the same would hold good as to his testimony of his signing the land contract in the presence of his father, having then received it and immediately returning it. *Jackman v. Inman,* 137 Wis. 30, 118 N. W. 189; *Chase v. Woodruff,* 138 Wis. 641, 646, 120 N. W. 499.

We think, however, that this testimony of the plaintiff was properly before the trial court for consideration in disposing of this case. On the adverse examination of plaintiff, taken at the instance of the defendants more than a year prior to the trial, he was examined fully by defendants' counsel upon a stipulated notice that he should produce on such examination the written evidence, records, etc., of transactions between plaintiff and said John C. Lamberson. He was there asked as to whether he took any part in the leasing of the farm after December, 1901; as to having the original or a copy of the alleged contract of December 23, 1901, and testified without objection that he did have the original in his possession at the time it was signed by him and at the date thereof; as to the number of copies that were signed; and in response to a question as to whether he could recall the contents of the alleged contract he answered:

"I know the general provisions of all three contracts, as I read them at the time I signed my contract, and Mr. Lamberson was particularly careful about showing me the other boys' contracts, and I read these contracts as well as my own and read the will made at that time providing for the disposal of his property, in which will, I believe, these contracts are all mentioned."

Defendants' counsel then moved to strike out all that part of the answer after the words, "I know the general provisions of all three contracts, as I read them at the time I signed my contract," as being unresponsive to the question. This objection, however, was not renewed at the trial.

When called as a witness on his own behalf at the opening of the trial he testified without objection as to being called by his father to Mr. Ekern's office December 23, 1901, and

that a written instrument was handed him at that time which he read over carefully. Defendants' counsel then objected to his testifying to the effect that he was asked to sign it by his father, on the ground that it was incompetent as being a conversation with a deceased person. The court received it subject to the objection, and plaintiff then testified that he did sign it in the presence of two witnesses and after the signatures of his father and mother were made.

The suggestion then being made that the contract was lost, which was not disputed, he was permitted to testify as to its contents, over objection on the ground that it related to a transaction with a deceased person. He also testified that he turned his contract over to his father the same day for safe-keeping, objection being interposed by defendants to this as a transaction with a deceased person. The court overruled the objection.

On cross-examination, referring to his direct examination as to the transaction of December 23, 1901, in Mr. Ekern's office, he was asked by defendants' counsel who was present at the time that he signed his copy and his father's copy. He was then interrogated concerning certain portions of his adverse examination before trial on the subject of how many copies were executed and whether he had not there testified that he had signed his name only once and that he did not carry the paper away with him and had not seen it since. He was further cross-examined as to the contract providing that he was to have possession immediately; as to the form of the contract, and as to when he signed the document, answering that he signed it after his father and mother had signed it.

On redirect examination plaintiff's counsel asked to have the witness testify as to all that was said between his father and himself at the time of the execution of the contract. The court held that there was not sufficient opening of the door by the adverse party to permit him to so testify, and nothing further was done in this regard on the trial.

We think that the use on the cross-examination of the plaintiff by defendants' counsel of the portion of the deposition of plaintiff as an adverse witness was sufficient opening of the door to permit the witness's testimony as to his signing of the contract after the father and mother had signed it to stand as a part of his case.

Manifestly if this examination of the plaintiff had been made at the trial by defendants calling him as an adverse witness under sec. 4068, Stats., the door would have been opened by such examination to permit the plaintiff to testify in that regard at least. *Drinkwine v. Gruelle,* 120 Wis. 628, 632, 98 N. W. 534. It was as effectual as though it had been based upon an express offer on defendants' part so to examine as to the transaction, as in *Johnson v. Bank of Wisconsin,* 163 Wis. 369, 373, 158 N. W. 59.

Furthermore, the defendants themselves made all the plaintiff's testimony on his adverse examination part of the record in this case by their offer of the whole of the deposition without qualification or reservation of any kind at the closing of the testimony. While it is true that such a deposition is not a part of the record on the trial until it be offered, yet the express right is given by sub. 2, sec. 4096, Stats., to the party taking the examination to offer the same whether the party so examined be present or not. It is also true that such cannot be offered by the party whose deposition is thus taken (*Lange v. Heckel,* 171 Wis. 59, 175 N. W. 788, and followed in *Thomas v. Lockwood Oil Co.* 174 Wis. 486, 182 N. W. 841), yet by defendants' own offer of the deposition they made it their own evidence, subject to proper objections to the whole or parts thereof by the other party. *Maldaner v. Smith,* 102 Wis. 30, 40, 78 N. W. 140; *Sioux Land Co. v. Ewing,* 165 Wis. 40, 45, 160 N. W. 1059. The testimony thus made a part of the record may as properly be used by the plaintiff in the consideration of this case as though he had been called in surrebuttal to testify as to

transactions concerning which the defendants had already thus offered evidence, as was done in the case of *Anderson v. Anderson,* 136 Wis. 328, 331, 117 N. W. 801.

We are satisfied, therefore, that there was in the record ample to support the finding of the court that there was a signing of this land contract by the plaintiff as well as by the father and mother, that it covered the property in question, that its terms were substantially as testified to by the plaintiff and the other witnesses, and that it was intended to be and considered an effectual transaction whereby the minor son, then a member of the family and under the father's direction and control, became vested with the same rights in and to the real estate described in his land contract as did the sons *George* and *Alfred* in their respective pieces. That possession was not taken by *Lloyd* of his piece of land, as was done by *Alfred* and *George* of their respective portions, that no accounting was ever demanded by *Lloyd* during his father's lifetime, and no assertion of ownership made by him during that period, is not sufficient in our judgment, in view of the situation and relationship existing between the two, to overthrow the findings of the trial court.

The plaintiff was not permitted to testify as to any express agreement between his father and himself in December, 1901, for the carrying on of the farm thereafter, if any such agreement were made, and the findings excepted to by defendants to the effect that there was such agreement are without direct evidence for their support; but in view of what has already been said such findings are not essential to support the judgment and may therefore be disregarded.

It is also unnecessary to consider whether actual manual delivery of a land contract by the grantor to grantee is essential in order to perfect the contract, for there is sufficient evidence, as indicated above, to warrant the court's conclusions that the transaction between the father and the plaintiff was completed. The relationship between the parties; the evident understanding by all members of the family that

Lloyd was not fitted for the work required to successfully manage a farm of that size, and that he was, with his parents' evident approval and consent, occupied in other pursuits; that the father was so situated that he could in a general way supervise the management of this farm and did arrange to have it conducted by the sons *Alfred* and *George* or their respective sons; the hesitancy that would naturally arise between a son so placed as was the plaintiff, on evidently affectionate terms with his father, to deal with such parent of whose bounty he was thus a beneficiary on a strictly business basis, all are amply sufficient to justify the conclusion of the trial court that there was no abandonment by *Lloyd* of the rights that he secured by the transaction of December 23, 1901.

Under the stipulated facts agreed to by the parties to this action it was evident that an accounting would have been an idle ceremony, as it stands conceded that the receipts and proper disbursements in the conduct of this farm balanced.

It follows from what is said that the conclusion of the trial court that the plaintiff is entitled to have it declared that he is the owner of the farm in question can and should be upheld.

By the Court.—Judgment affirmed.

SIEBECKER, C. J. (*dissenting*). I cannot concur in the decision and opinion of the court. Permitting the plaintiff to testify to transactions with his father concerning the signing and delivery and plaintiff's redelivery of the land contract in December, 1901, as detailed in the statement of the case and the opinion of the court, clearly shows, in my opinion, that the trial court erred in receiving plaintiff's evidence of those transactions over defendants' objection under sec. 4069, Stats. Nor can I concur that defendants waived this objection by their offer of plaintiff's deposition as an adverse party without qualifications before the reception of evidence was closed. To hold that such offer so made after the court

had erroneously admitted evidence of the substantial and material parts of such transactions with the deceased was an opening of the door on this subject by defendants, seems to me contrary to the intent of the parties. Such offer by defendants of plaintiff's adverse examination was manifestly induced by the court's erroneous ruling in admitting at the trial plaintiff's oral testimony of these transactions with his deceased father. In view of the court's action on this subject defendants' counsel naturally supposed that all plaintiff had testified to on this point was before the court and would be considered in deciding the case. It seems plain to me that this court's decision on this phase of the case is a misinterpretation of the defendants' purpose in thus finally meeting the trial court's erroneous rulings under the provisions of sec. 4069, Stats. A study of the evidence persuades me that the trial court's findings that plaintiff's father conveyed title by contract to the farm in question in December, 1901, are not sustained by the record on which the trial court acted. Furthermore, if the evidence of plaintiff concerning the transaction between him and his deceased father in December, 1901, be excluded from the case, as I think it should be, because incompetent under sec. 4069, Stats., then there is no evidence in the case to sustain the plaintiff's case.

I am of the opinion that the trial court committed prejudicial error in receiving plaintiff's evidence of the transaction with his deceased father and improperly based its findings on such evidence, and that there is no legal evidence to sustain the judgment and it should be reversed.

I am authorized to state that Mr. Justice OWEN concurs in this dissent.

A motion for a rehearing was denied, with $25 costs, on December 13, 1921.

WELCH, by guardian *ad litem,* Respondent, vs. MORTON SALT COMPANY, Appellant.

September 21—December 13, 1921.

New trial: Newly discovered evidence: Construction: Diligence: Discretion of court.

1. On a motion by plaintiff in a personal injury action for a new trial on the ground of newly discovered evidence, such evidence should be construed favorably to plaintiff in determining the question whether, if true, it shows actionable negligence on the part of the defendant.
2. In an action for injuries sustained by a five-year-old boy by coming in contact with an auger salt conveyer in defendant's plant, where plaintiff, after a motion for nonsuit had been granted, moved for a new trial on the ground of newly discovered evidence, it was not an abuse of discretion to grant a new trial where the new evidence might show liability on the part of defendant.
3. The granting of a new trial is largely in the discretion of the trial court and will not be disturbed except for cogent reasons.

APPEAL from an order of the superior court of Douglas county: SOLON L. PERRIN, Judge. *Affirmed.*

Action for personal injury sustained by plaintiff, an infant of about five years of age, on August 23, 1919, at defendant's salt works near Tower Bay Slip, Superior, by coming in contact with an auger salt conveyer claimed to have been left uncovered. Plaintiff was dumb and his hearing was defective or entirely lacking. The day before the accident he had been at the plant of the defendant and had been chased out by defendant's employees over half a dozen times. He persisted in coming back and was there at 6 o'clock when defendant's foreman caught him, called up police headquarters, and asked if any one was looking for a boy five or six years old. Upon being told that no inquiries had come to the police station the foreman started out with plaintiff in his arms and after a number of inquiries was able to locate his home at 432 Tower avenue, where he took the boy and

told his mother where he had been and that it was a dangerous place to be. The next day at about half-past 4 plaintiff again appeared in the cooper shop at the plant, and the evidence is that the foreman put him out and he went down the track. He next appeared in the sack room, where the foreman, Hangartner, and one Anderson were cleaning the machines with a steam hose. When discovered he started to crawl on top of the benches and play with the wheel of one of the machines. The foreman took him down and put him out through the door on the west side of the dock. The foreman soon after left the room for a few minutes and when he returned to the sack room he heard a scream. He ran back to the screw salt conveyer and found plaintiff with his foot in it. Such was the substance of the evidence as to the circumstances under which plaintiff was injured. At the close of the trial the court granted a motion for a nonsuit on the ground that no negligence on the part of the defendant had been shown.

Later plaintiff moved for a new trial on the ground of newly discovered evidence. The nature of such evidence is disclosed by the affidavits of Theodore Rask and Marion Rask, who claimed to have been present at the time of the injury but were not called as witnesses. The affidavits are as follows:

"Theodore Rask, being first duly sworn, on oath says that he resides in the city of Superior, Douglas county, Wisconsin, and at number 1008 North 18th street; that he is in the employ of the Great Northern Railway Company as a freight conductor; that on the date of the accident and injuries to *Kenneth Welch* in the building of the *Morton Salt Company,* at Superior, Wisconsin, on or about August 23, 1919, this affiant was in said building; that affiant is the husband of Marion Rask, who formerly was employed at said *Morton Salt Company's* plant in the city of Superior, Wisconsin; that affiant came to call for his wife between 4 and 5 o'clock p. m. on the day of the accident; that when he came in the little *Welch* boy was in Jake Hangartner's arms and Jake then spoke to me and told me about the boy and showed

me the tag; he then set the boy down on the floor, the boy walked over by the conveyer and toward the drier room door. I saw the boy standing there looking into the drier room. I saw the auger conveyer at that time, and know it was not covered. In a few minutes after I heard the boy scream. Jake went over and was taking him out. I went over there and was present when Jake took the boy out. Mr. Luse came to our house some time in March, 1920, and I told him all I knew about the matter, as I have stated above; he said that made it look bad for the company. He inquired if we were going to be home right along so they could call us for witnesses if they needed us. I said we were, that we might be away for a short time. We were home all the time after that until the present, except a few days we were on a visit in Minneapolis. I didn't know of the case being tried until November 19, 1920, when my wife told me. I immediately phoned Mr. Crawford that we were witnesses. Mr. Luse had told us that Mr. Crawford was the attorney for Mr. Welch. Jake didn't at any time try to put the boy out while I was there."

"Marion Rask, being first duly sworn, on oath says that she resides at 1008 North 18th street in the city of Superior, Douglas county, Wisconsin, and is the wife of Theodore Rask; that on or about the 23d day of August, 1919, the date on which *Kenneth Welch* was injured in the building of the *Morton Salt Company,* at Superior, Wisconsin, this affiant was present; that affiant was formerly employed in the sewing or packing room of said plant of said company; that she had worked there in 1917 and part of 1918; that on the day of the accident she called at the plant to find out if they had installed the other machine in the packing room, as she intended to go to work there for a short while if they had. Affiant further says: I stood outside the packing room and watched two men using the steam hose cleaning in the packing room. While standing there Jake Hangartner came up and spoke to me, and he went into the packing room. I went right in after him. Jake talked to the men and I stood there until he got through. Just then the *Welch* boy came in and stood on the steps looking into the room; the boy came into the room. Jake told me that the boy was there the day before, Jake then talked to me, showing me the machine, and the boy climbed upon the table and played with the spout,

Jake took the boy down and stood him on the floor and continued showing the machine. The little boy came to where we were and started to take hold of the machine Jake was explaining and showing to me. Jake said the boy was very bright and fond of machinery. The girls I was acquainted with had gone home. I said then I'd go and write a note to the girls, I then went out and into the girls' cloak room. Jake came out with me, and the boy was right beside him. He either had the boy by the hand or the boy was walking close to him. Jake and the boy stood right close by the auger conveyer watching it as I went into the girls' room. I stood writing the note, looking out at Jake and the boy. I saw Jake stoop down and either take the cover off, or the cover was off the auger, and he stooped down to do something about the conveyer. I then came out and stood in front of the packing-room door where I could see the auger. Jake walked to me and the boy stood in front of the drier-room door, which was open, looking in at the drier, which was running. When Jake saw the boy hadn't followed him he waved at him to come, but the boy didn't see him, so he went and picked him up and carried him to where I was standing and showed me the tag on the boy. At that time the auger conveyer cover was off. Just at that time while Jake was showing me the tag on the boy my husband came in, as I had told him to call for me. Jake explained to my husband about the little boy, that he was there the day before, that he was deaf and dumb. The boy wanted to get down so Jake set him down. Jake stood him on the floor and was talking to us. The boy walked away and I didn't notice him, and in a few minutes I heard him scream and then the boy was in the conveyer. Jake did not at any time attempt or make any effort to put the boy out of the room while I was there. I was there from the time I first spoke to Jake until the accident—twenty, twenty-five minutes. Sometime in March, 1920, Mr. Luse came to our house and I told him all I knew about the matter, as I stated above. He said that looked bad for the company. He said they might need us for witnesses and they would call us if they'd need us. I was home during the time the case was tried and saw it mentioned in the newspapers. I expected to be called and later learned that the company won the case. My husband phoned Mr. Crawford November 19, 1920, stating to him that we

were there and knew about the accident. I thought I shouldn't go to court as a witness until we were called. Enoch came out and put the cover on the auger after the accident."

There were also affidavits by plaintiff's father and attorney setting forth the diligence used to obtain evidence. The substantive facts set forth in the affidavits of Theodore and Marion Rask as to how the injury occurred are denied in affidavits of Jacob Hangartner and C. Z. Luse.

The court held plaintiff had used due diligence to prepare for trial and granted the motion for a new trial because of the testimony to be given by the Rasks. From an order entered accordingly the defendant appealed.

For the appellant there was a brief by *Powell & Sprowls* of Superior, attorneys, and *Edward H. Stearns* of Chicago, of counsel; and the cause was argued orally by *Mr. John S. Sprowls* and *Mr. Stearns.*

For the respondent there was a brief by *Grace, Fridley & Crawford* of Superior, and oral argument by *W. P. Crawford.*

The following opinion was filed October 18, 1921:

VINJE, J. We shall not set forth the evidence as to the degree of diligence used by plaintiff to prepare for trial. Upon important points it is in conflict, and that being so it was especially a question for the trial court to decide. We cannot say there was an abuse of discretion in resolving that issue in favor of plaintiff.

The serious question in the case is whether the newly-discovered evidence, taken as true, shows actionable negligence on the part of the defendant. Such evidence is not as specific upon certain points as it should be and is susceptible of different interpretations. The trial court construed it favorably to plaintiff, as he had a right to do and should do upon such an application. We purposely forbear to express any opinion at this time upon the merits further than to

say that it may appear upon the next trial that plaintiff at the time of the injury was an invitee upon the premises and that the defendant failed to exercise the care it owed him as such or that it is otherwise liable. Neither party should be foreclosed by expressions of opinion at this time because the new trial may develop a state of facts quite different from those considered upon this appeal. Here the question is, Did the trial court abuse its discretion in granting a new trial? We think not because the new evidence may show liability on the part of the defendant, and for that reason we cannot say there was any abuse of discretion. The granting of a new trial is largely in the discretion of the trial court and will not be disturbed except for cogent reasons. *R. Connor Co. v. Goodwillie,* 120 Wis. 603, 98 N. W. 528; *Eggen v. Fox,* 124 Wis. 534, 102 N. W. 1054; *Godfrey v. Godfrey,* 127 Wis. 47, 106 N. W. 814; *Bailey v. McCormick,* 132 Wis. 498, 112 N. W. 457; *Gross Coal Co. v. Milwaukee,* 148 Wis. 72, 134 N. W. 139.

By the Court.—Order affirmed.

A motion for a rehearing was denied, with $25 costs, on December 13, 1921.

WAUKESHA GAS & ELECTRIC COMPANY, Respondent, vs. WAUKESHA MOTOR COMPANY, Appellant.

September 23—December 13, 1921.

Public utilities: Jurisdiction of railroad commission: Failure of utility to perform contract.

Secs. 1797—37*m* and 1797—12*a*, Stats. (the railroad commission law), relating to jurisdiction of the railroad commission over questions of overcharges or inadequate service, do not deprive the courts of jurisdiction to hear an action or counterclaim based on the failure of a public utility to perform its contract duty, such as the failure of a gas and electric company to perform its contract to furnish a certain quantity of gas and

electricity. The jurisdiction of the commission is confined to prescribing rates and regulations for the future, and it has no jurisdiction to redress wrongs or grievances arising from past conduct of the utility.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The plaintiff is a public utility furnishing gas and electric service in the city of Waukesha. The defendant is the proprietor of a manufacturing plant located in that city. In an action brought by the plaintiff against the defendant, the defendant interposed a counterclaim in which it was alleged, in effect, that the plaintiff had entered into a contract by which it undertook and agreed to furnish the defendant with all of the electric energy necessary to properly operate its plant, and with two million cubic feet of gas per month; that by reason of this contract it equipped its plant with electric motors and with proper appliances; that plaintiff breached said contract by failing to furnish electrical energy in sufficient quantity to enable defendant to properly prosecute its manufacturing business, and that it failed to furnish it with the two million cubic feet of gas per month, which resulted in embarrassment and delay in the prosecution of its manufacturing business, all to its damage in the sum of $150,000.

A demurrer to the counterclaim was interposed, upon the ground that the court had no jurisdiction of the cause of action, and on the further ground that no facts were stated to constitute a cause of action. The court made an order sustaining the general demurrer, generally. While the order did not state the grounds upon which the demurrer was sustained, an opinion filed by the trial judge indicates that it was sustained because the court had no jurisdiction. This appeal is from the order sustaining the demurrer.

For the appellant there was a brief by *Frame & Blackstone* of Waukesha, and oral argument by *H. J. Frame.*

For the respondent there was a brief by *Jacobson & Malone* of Waukesha, and oral argument by *M. A. Jacobson.*

The following opinion was filed October 18, 1921:

OWEN, J. The counterclaim sets forth a cause of action for a plain breach of contract. That it sets forth facts sufficient to constitute a cause of action is not seriously challenged here. A demurrer thereto was sustained on the ground that the court had no jurisdiction of the cause of action. The trial court was of the opinion that the railroad commission had exclusive jurisdiction to deal with the subject. Respondent seeks to maintain that position by reason of the analogy between our public utility act and the interstate commerce act, under the express terms of which, as construed by the federal court, exclusive jurisdiction is vested in the interstate commerce commission to deal with certain controversies arising between shippers and carriers. But it must be remembered that this exclusive jurisdiction springs from the express provisions of the interstate commerce act and that it does not extend to controversies of every nature, kind, and description arising between the shipper and the carrier. It is confined and limited to the determination of matters calling for the exercise of the administrative power and discretion of the commission. This is well settled. *Texas & P. R. Co. v. Abilene C. O. Co.* 204 U. S. 426, 27 Sup. Ct. 350; *Galveston, H. & S. A. R. Co. v. Wallace,* 223 U. S. 481, 32 Sup. Ct. 205; *Pennsylvania R. Co. v. Puritan C. M. Co.* 237 U. S. 121, 35 Sup. Ct. 484; *Ill. Cent. R. Co. v. Mulberry Hill C. Co.* 238 U. S. 275, 35 Sup. Ct. 760. Consequently courts have no jurisdiction of controversies growing out of excessive charges or inadequate service. What is a reasonable charge or adequate service is a matter committed by Congress to the determination of one agency of nation-wide jurisdiction, the interstate commerce commission, and courts will not attempt to determine questions relating thereto in advance of their determination by the commission. The reason for this, as stated in *Texas & P. R. Co. v. Abilene C. O. Co.* 204 U. S. 426, 441, 27 Sup. Ct. 350, is

that "if the power existed in both courts and the commission to originally hear complaints on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

Our own railroad commission law, secs. 1797—37*m* and 1797—12*a*, provides in effect that any person aggrieved by reason of any overcharge or inadequate service may make complaint to the railroad commission, upon which the commission shall have power to investigate the complaint, to hear the same and decide upon the merits thereof; that upon the finding of the amount of said excess charge the carrier may lawfully pay the same to the shipper, and if it refuses so to do, the party complaining may maintain an action in the courts of this state to recover the amount of such excessive charge as found by the commission, and the finding of the commission shall be *prima facie* proof of the facts found by it. This remedy was held to be exclusive, in so far at least as an attack on a schedule rate is concerned, in *Frank A. Graham Ice Co. v. C., M. & St. P. R. Co.* 153 Wis. 145, 140 N. W. 1097. The reason for such holding is well summarized in the following excerpt from the opinion:

"The statutes referred to show that the whole matter of fixing rates and the remedies for excessive charges is lodged with the railroad commission. The rates in the schedule made and filed constitute the lawful rates until changed in the manner provided, on application to the commission. The schedule rates being by the express terms of the statute the lawful rates, the railroad companies have not authority to charge different rates. They are prohibited by statute from so doing. They can charge neither more nor less than such rates. In a common-law action, therefore, to recover for excessive rates the courts cannot say that the schedule rates are unlawful rates. This obviously is necessary in order to

preserve equality and uniformity in rates and the carrying out of the system established by the legislature in creating the railroad commission."

But it has been said by the federal supreme court, speaking of the interstate commerce act, that "it did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the commission or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive." *Pennsylvania R. Co. v. Puritan C. M. Co.* 237 U. S. 121, 35 Sup. Ct. 484; *Ill. Cent. R. Co. v. Mulberry Hill C. Co.* 238 U. S. 275, 35 Sup. Ct. 760. And we accordingly find numerous instances in the books where courts have entertained actions at law to recover damages growing out of a failure of the carrier to perform its contract duty, or some other duty definitely established by law, or otherwise, where the determination of the interstate commerce commission is not necessary in order to determine such duty. Thus, in the cases of *Galveston, H. & S. A. R. Co. v. Wallace,* 223 U. S. 481, 32 Sup. Ct. 205; *Altschuler v. Atchison, T. & S. F. R. Co.* 155 Wis. 146, 144 N. W. 294; and *Wooster v. C. & N. W. R. Co.* 167 Wis. 6, 166 N. W. 431, the railway companies were held in actions at law for damages resulting from breaches of their contracts in their failure to make delivery in accordance with their contracts of shipments; and in *Pennsylvania R. Co. v. Puritan C. M. Co.* 237 U. S. 121, 35 Sup. Ct. 484, and *Ill. Cent. R. Co. v. Mulberry Hill C. Co.* 238 U. S. 275, 35 Sup. Ct. 760, actions were entertained to recover damages for failure to provide sufficient cars and for unjust discrimination in furnishing cars in violation of the carrier's own rule to furnish all shippers on equal *pro rata* basis. The nature of the causes of action of which the interstate commerce commission has exclusive jurisdiction is well illustrated by the case of *Wooster v. C. & N. W. R. Co.* 167 Wis. 6, 166 N. W. 431. That was

an action to recover damages because of the failure of the carrier to deliver a shipment of race horses to the Allentown fair grounds. The question was whether such failure constituted a breach of the contract of shipment or whether it was due to a misrouting. If the latter, the matter was within the exclusive jurisdiction of the interstate commerce commission. If it constituted a breach of contract the court had jurisdiction of the action. Another illustration appears in the opinion of the federal supreme court in *Pennsylvania R. Co. v. Puritan C. M. Co.* 237 U. S. 121, 35 Sup. Ct. 484, where it is said:

"But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the commission has declared the rule to be unjust, redress must be sought before the commission or in the United States courts of competent jurisdiction as provided in sec. 9.

"But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts."

If more time than necessary has been spent in pointing out the limitations of the exclusive jurisdiction of the interstate

commerce commission in the matter of controversies arising between shipper and carrier, it is because of the sincere assurance of the learned counsel for respondent that the principle of those cases in which it has been held that the interstate commerce commission has exclusive jurisdiction of the subject matter involved applies to the cause of action set forth in the counterclaim, as it is apparent that an understanding of the limitations of that jurisdiction is a self-refutation of the contention. Such exclusive jurisdiction is dependent upon the statute, and where there is no statute comparable to the provisions of the interstate commerce act conferring such jurisdiction no similar jurisdiction exists. We have no statute in this state clothing the railroad commission with any power or authority to determine controversies such as are presented by the counterclaim. That pleading sets forth the fact that the plaintiff entered into a contract with the defendant by which it agreed to furnish it with a certain amount of gas and electrical energy for the purposes of running its manufacturing plant. It then alleges that the plaintiff failed to fulfil its agreements and obligations in such respect, and that damages to the defendant resulted because of such failure. Now we ask where the power is vested in the railroad commission to determine the issue thus presented, or grant relief for the wrong and damages sustained? It is true that the railroad commission has a supervisory and regulatory control over the public utilities of this state in the matter of prescribing reasonable rates and fixing standards of adequate service. But its orders in such respect relate solely to the future. It has no power to redress any wrongs or grievances arising from the past conduct of the utility. In this case the findings of the railroad commission can be of no assistance to the court. The obligations of the utility are measured by the terms of its contract with the defendant. If that is a valid contract, and we now are so assuming, the only issue to be determined is whether there was a breach thereof on the part of the utility and the

amount of the damages sustained because of such breach. This is a judicial question, pure and simple. It is a wrong sustained by the defendant which the railroad commission has no power to redress, neither can it be of any assistance to the courts in determining the rights of the parties.

We have already said that we assumed the contract to be legal. The counterclaim is properly subject to criticism because it does not allege that the contract called for rates approved by the railroad commission, and by virtue of sec. 1797*m*—33, Stats., the utility cannot accept for its service any rates other than those approved by the railroad commission. However, under the liberal rule of construing pleadings most favorably to the pleader we have assumed that the contracts referred to in the counterclaim were legal contracts. If they were legal, we see no reason why they should not be binding upon the utility and why it is not responsible for the damages resulting from the breaches thereof. If for any reason they were illegal, that matter may be pleaded as a defense. However, as the pleadings now stand, the counterclaim states a valid cause of action, of which the court has jurisdiction. It results that the order sustaining the demurrer should be reversed.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

A motion for a rehearing was denied, with $25 costs, on December 13, 1921.

PAULY, Plaintiff in error, vs. KEEBLER, Defendant in error.

October 21—December 13, 1921.

Mechanics' liens: Principal contractor as trustee for lien claimants: Validity of statute: Constitutionality: Due process of law: Equal protection of the laws: Imprisonment for debt: Embezzlement: Criminal intent: Who are beneficiaries of trust.

1. The first article of the declaration of rights in the state constitution is a substantially equivalent limitation of legislative power to that imposed by the Fourteenth amendment to the federal constitution, and the legislature is bound to accord to all persons the equal protection of the laws and refrain from legislation depriving any one of life, liberty, or the pursuit of happiness.
2. Within the constitutional provision requiring due process of law or its equivalent, the law of the land, a statute duly enacted by the legislature is not necessarily the law of the land if it is so arbitrary and capricious as to deprive the citizen of fundamental rights guaranteed by the constitution.
3. Statutes do not in all cases deprive citizens of due process of law merely because they are limited to particular classes, since the legislature can make classifications to promote the general welfare if there exists such reasonable ground for the classifications as to show that they are not arbitrary and personal or do not unjustly discriminate between different classes of individuals.
4. A statute which applies to all individuals similarly situated does not deny equal protection of the laws, though it is invalid if individuals or corporations are singled out for the imposition of burdens or as beneficiaries.
5. Sub. 3, sec. 3315, Stats., which makes it embezzlement for a principal contractor receiving money from a landowner to appropriate it for his own use without paying those persons entitled to a lien on the land, is constitutional, as it benefits every property owner irrespective of the value of his holdings, and under certain circumstances might be a protection to all laborers, subcontractors, and materialmen. The legislature may therefore constitute the moneys so received by the principal creditor a trust fund and punish its misappropriation as an embezzlement.
6. Said sub. 3, sec. 3315, though it does not expressly prescribe that the prohibited act must be with fraudulent intent, implies a wrongful intent by the use of the term "embezzlement,"

and a conviction cannot be had thereunder without proof of an intent to defraud, the same as such proof must be made in a prosecution under sec. 4418. (JONES, J., is of the opinion that it is competent for the legislature to create the offense of embezzlement without mention in the act of criminal intent.)

7. Said sub. 3, sec. 3315, does not violate sec. 16, art. I, Const., providing that no person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied.
8. Statutes are to be upheld by the courts unless they are unconstitutional beyond any reasonable doubt.
9. All legislative powers not withheld or limited by the constitution of the state or the exercise of which is not prohibited by the federal constitution are vested in the legislature, and courts cannot set aside statutes merely because they may be deemed unwise or may work inconvenience or hardship.
10. Sub. 3, sec. 3315, is not limited to cases where a claim of lien has been filed, but it does not apply where the right to a lien has been lost.

ESCHWEILER, J., dissents in part.

ERROR to review an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

For the plaintiff in error the cause was submitted on the brief of *A. W. Richter* of Milwaukee.

Allen D. Young, district attorney of Waukesha county, for the defendant in error.

JONES, J. This is a writ of error prosecuted by the plaintiff in error from an order entered in the circuit court for Waukesha county remanding plaintiff in error to custody after the issuance of a writ of *habeas corpus.*

The defendant is charged with the embezzlement of $1,200 from one Volbrecht under the provisions of sub. 3, sec. 3315, Stats. At the preliminary hearing it appeared that defendant agreed to construct a house for Volbrecht for $1,950; that Volbrecht paid defendant $1,770; that defendant accounted for $500 of this money; that at the time of the account there was due to one Lang about $1,000 for lumber; that there were a few labor bills due, and that he had spent a good share of the money for living expenses, and

that twice after this accounting defendant had said he would pay the foregoing claims.

The defendant moved the court for an order of discharge on the ground that the state had failed to show that a crime had been committed. The motion was denied and the defendant was bound over to the regular term of the municipal court for trial. Thereupon defendant sued out a writ of *habeas corpus,* which was granted, and after a hearing he was remanded to custody.

It is claimed by plaintiff in error that the statute under which this action was brought is unconstitutional. The following is the statute:

"All moneys paid by the owner to the principal contractor shall be and constitute a trust fund in the hands of such principal contractor, to the amount of all claims due from or owing by such principal contractor for work, labor and materials or to become due from or owing by such principal contractor for such work, labor and materials to persons entitled to a lien under this chapter against said owner and his property until all such claims have been paid; the using of such moneys by such principal contractor for any purpose other than the payment of such claims, until all such claims, except those which may be in dispute, have been paid, is hereby declared to be an embezzlement of said moneys punishable as provided by law in case of embezzlement."

The statute is assailed on the grounds that it violates the Fourteenth amendment to the constitution of the United States, in that it seeks to deprive a person of liberty and property without due process of law and denies to persons within the jurisdiction of the state the equal protection of the law. It is said that the statute is class legislation of the worst kind and deprives the contractor of his liberty without due process of law.

It is well settled that before the enactment of this amendment the first article of the declaration of rights in the constitution of the state was a substantially equivalent limitation

of legislative power, and that our legislature is bound to accord to all persons within its jurisdiction the equal protection of the laws, and to refrain from legislation which deprives any of them of life, liberty, or the pursuit of happiness. *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *Anderton v. Milwaukee,* 82 Wis. 279, 52 N. W. 95; *Janesville v. Carpenter,* 77 Wis. 288, 303, 46 N. W. 128; *Hincks v. Milwaukee,* 46 Wis. 559, 566, 1 N. W. 230; *Durkee v. Janesville,* 28 Wis. 464, 469.

In most if not all the other state constitutions there is an equivalent declaration of rights, as there are those clauses giving the protection of "due process," or, as it is sometimes phrased, "the law of the land." Cooley, Const. Lim. (7th ed.) 500. It is also well settled that an act of the legislature is not necessarily the law of the land, nor does it necessarily afford the protection of "due process of law" guaranteed by our constitution. As was well said by an able judge:

"The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the constitution into mere nonsense. The people would be made to say to the two Houses, 'You shall be vested with the legislative power of the state, but no one shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose.' In other words, 'You shall not do the wrong unless you choose to do it.'" Mr. Justice BRONSON in *Taylor v. Porter,* 4 Hill (N. Y.) 140, 145.

Accordingly there have been innumerable decisions that when the legislature by statute arbitrarily and without good cause infringes the property rights or the liberty of any citizen within the protection of the constitution, such action is a denial of due process of law. In every case the problem to be solved is whether the statute is so arbitrary and capricious as to deprive the citizen of those fundamental rights guaranteed by the constitution.

This statute is earnestly assailed by counsel for plaintiff in error because it gives the lienholder a remedy in excess of that given to other creditors. It is argued that it is an act urged through the legislature by a powerful class, small in number, for its own benefit, with absolutely no advantages to the public at large, and giving to this class benefits which no other class enjoys.

But statutes do not in all cases deprive citizens of due process merely because they are limited to particular classes. In our complex civilization the legislature is competent to make classifications in order to promote the general welfare. Statutes in every state abound in provisions which give privileges to and impose restrictions upon those engaged in the various occupations. Such statutes do not deprive citizens of due process or the law of the land if there exists such reasonable ground for the classifications as to show that they are not arbitrary and personal, or unjustly discriminatory between different classes or individuals.

Among statutes of this class are those regulating the admission of physicians to practice their profession (*State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561); statutes imposing progressive rates of taxation upon those receiving different amounts of incomes (*Income Tax Cases,* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164) or inheritances (*Black v. State,* 113 Wis. 205, 89 N. W. 522); statutes limiting the hours of labor (*Utah v. Holden,* 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103; *People v. Lochner,* 73 App. Div. 120, 76 N. Y. Supp. 396); those imposing restrictions on bankers, common carriers, and insurance companies and their modes of doing business (Cooley, Const. Lim. (7th ed.) p. 555); those subjecting telegraph companies to damages for mental anguish for failing to deliver messages promptly (*Nitka v. Western Union Tel. Co.* 149 Wis. 106, 135 N. W. 492); those regulating the sale of the lands of minors (*Kibby v. Chitwood's Adm'r,* 4 T. B. Mon. (Ky.) 91, 16 Am. Dec. 143; *Rice v. Parkman,* 16 Mass. 326); those prohibiting the pursuit of certain branches of business on

Sunday (*People ex rel. Hobach v. Sheriff*, 13 Misc. 587; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *State v. Hogreiver*, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504).

In discussing this subject of classification and the Fourteenth amendment in a decision of the United States supreme court it is said:

"A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsley v. Natural C. G. Co.* 220 U. S. 61, 78, 31 Sup. Ct. 337.

Very familiar illustrations of this kind of legislation are the mechanics' lien statutes. When these were first enacted they were earnestly assailed because it was claimed they denied to the owners of property the equal protection of the law and discriminated among creditors, making certain classes of creditors preferred classes. Such statutes now exist in most if not all the states of the Union and are upheld except that in a few states some provisions of such statutes have been disapproved. Although these statutes make distinctions between different classes of creditors, they apply equally to all similarly situated, and in the consideration of the question whether due process has been denied this fact is of prime importance. If individuals or corporations are singled out for the imposition of burdens or as beneficiaries the statute is of course partial, unjust, and a denial of the equal protection of the law. Statutes for the creation and enforcement of mechanics' liens are upheld because they give a security to those whose labor and material have gone into the structure. They rest on claims of natural justice and in part on the maxim that the laborer is worthy of his hire.

The statute under consideration is made a part and parcel of the mechanics' lien statute. It relates to the same classes of individuals as the general statute, and no others. The class is a very large one. It is argued by plaintiff in error that the statute was enacted for the benefit of owners only. If this were true it is hardly correct to say, as claimed, that the class is very limited, since the statute applies equally to the owner of the humble cottage and to the owner of a palatial building.

It is easy to conceive of situations where compliance with the statute might be a protection to laborers, materialmen, and subcontractors as well as to the owner, as for example where after the contractor receives his compensation, and before payment to materialmen and others, the structure is burned or otherwise destroyed.

It is urged that when money is paid by the owner to the contractor the legal title passes; that the contractor may use it as he pleases, and that it is beyond the power of the legislature to impose upon it a trust; and that if such a statute is constitutional it would be but another step, and entirely competent for the legislature to make all debtors trustees for their creditors. We do not consider that any such conclusion logically follows.

When the owner pays the contractor for labor and material which has become part of a building or other structure there is often the express agreement that the money shall be devoted to its proper use, that is, to payment for the labor and materials of which both owner and contractor are presumed to have the benefit. If there is not such an agreement, express or implied, there is at least the reasonable expectation on the part of the owner that the money will not be diverted to other uses. There is, without the aid of any statute, a confidence, not amounting to a legal trust relation, but closely akin to it. There is very clearly a moral obligation, extending to both the owner and to those whose material or labor has entered into the structure, that the

compensation paid therefor by the owner should not be misapplied. In such a case there is something more than a mere contract relation between the owner and the contractor and between the contractor and the others referred to in this statute. When the contractor receives the money from the owner he owes a duty to the third persons whose labor and materials have enabled him to obtain that money. Before the statute was enacted the contractor could ignore this duty and spend the money for the use of his family or squander it as he saw fit without incurring any criminal liability.

The objection is urged that the statute makes acts criminal which were innocent before. In the sense that contractors could legally use for other purposes moneys intended by the owner to be paid to those who might be entitled to file liens, the act might be said to be innocent, but that such acts were free from moral delinquency we cannot admit. The legislature has seen fit to enact that the money thus received by the contractor shall be a trust fund and that its misappropriation shall be embezzlement. Embezzlement is a statutory, not a common-law, offense. Without some statute the large class of persons referred to in sec. 4418, as to embezzlement, would not be criminally liable for the misappropriation of funds. The legislature, mindful of the abuses and the injustice which often arose when contractors failed to perform this duty by neglecting to pay over to third persons moneys intrusted to them for that purpose, enacted that such moneys should be a trust fund and that their misappropriation should be embezzlement.

If it is within the legislative power to enact that moneys thus received from one class of persons for the benefit of another class are trust funds and are to be treated accordingly, there is clearly no valid objection to imposing adequate punishment for a violation of the trust. It would be no greater power than is exercised in many statutes in every state, the object of which is to prevent the misappropriation of funds.

It is also urged that the effect of the statute would be to deprive the plaintiff in error of due process of law because it purports to create a criminal offense without prescribing that the act prohibited must be with fraudulent intent.

It is true that in statutes imposing penalties for embezzlement the element of fraud or wrongful intent is generally expressed, and it is generally held that a criminal intent is a necessary ingredient of the offense.

"In embezzlement as in most crimes the essence of the offense or that which makes it criminal is the intent with which the act is done, which may be shown or conclusively presumed from the doing of the wrongful, fraudulent, and illegal acts which in their necessary results naturally produce loss to the person, natural or artificial, against whom the offense is committed. Where, however, the act or omission is of itself made to constitute the offense, knowingly and wilfully doing the act or omitting to perform the duty imposed by the law carries with it a conclusive presumption of criminal intent, and no other evidence of such intent is necessary." 15 Cyc. 491. See cases in note 13 A. L. R. 145.

It is the view of the majority of the court that since the statute in question declares certain specified acts to be embezzlement, the wrongful intent is necessarily implied and included in the statute, and therefore it is not essential to the validity of the statute that the intent be more specifically expressed. Hence a conviction under this statute cannot be had without proof beyond a reasonable doubt of an intent to defraud the same as proof thereof must be made in a prosecution under sec. 4418, Stats.

The writer expresses his own view only in saying that it is competent for the legislature to create the offense of embezzlement without any mention in the act of the wrongful or criminal intent. Of course the statutes in every state abound in sections punishing misdemeanors thus created.

But there are numerous statutes, long acquiesced in, creating crimes punishable in the penitenitary which omit all language expressive of fraudulent or wrongful intent. Our

statute as to polygamy (sec. 4577) is an example. Under a similar statute in Massachusetts, Mr. Chief Justice SHAW rendered the opinion of the court sustaining the conviction and said:

"If the statute has made it criminal to do any act under particular circumstances, the party voluntarily doing that act is chargeable with the criminal intent of doing it." *Comm. v. Mash,* 7 Metc. (48 Mass.) 472, 474. See *Comm. v. Thompson,* 11 Allen (Mass.) 23; *Comm. v. Hayden,* 163 Mass. 453, 40 N. E. 846.

Secs. 4550*m* and 4539*m,* Stats., are illustrations of such statutes.

One of the assignments of error is that the statute violates sec. 16, art. I, of the constitution of the state, which provides that "No person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied."

It is argued that the relations between owner and contractor and between him and those furnishing the labor or material are purely contractual and that the statute is designed to provide an additional and drastic remedy for the performance of a mere contractual obligation. It was held in this state at an early date that this constitutional provision did not apply in cases of tort committed; and that where there was the conversion of the money of a client by an attorney the wrongdoer was liable to all the consequences of his act, including an execution against his body, notwithstanding there may have been a contractual obligation. *Cotton v. Sharpstein,* 14 Wis. 226; *Petition of Mowry,* 12 Wis. 52.

This court has also held that a statute authorizing imprisonment, as for contempt, of a judgment debtor who disobeys an order for the payment or delivery of money or property made in a proceeding supplementary to execution is not a violation of this clause of the constitution, even though the judgment was for debt founded on a contract. *In re Milburn,* 59 Wis. 24, 17 N. W. 965.

For stronger reasons it should be held that the constitutional prohibition does not apply where the imprisonment is to punish crime. In such a case the imprisonment is not for any debt arising out of or founded on contract, express or implied, but on account of the criminal act. This is the rule which has been declared in prosecutions against bankers for receiving deposits with knowledge of insolvency (*Baker v. State,* 54 Wis. 368, 12 N. W. 12; *Meadowcroft v. People,* 163 Ill. 56, 45 N. E. 991; *Robertson v. People,* 20 Colo. 279, 38 Pac. 326), in prosecutions for defrauding hotel-keepers (*State v. Benson,* 28 Minn. 424, 10 N. W. 471; *State v. Engle,* 156 Ind. 339, 58 N. E. 698; *In re Milecke,* 52 Wash. 312, 100 Pac. 743); and for obtaining money under false pretenses, and other statutes which might be cited. Under statutes in many respects similar to the one under consideration the same rule has been declared. *State v. Hertzog,* 92 S. C. 14, 75 S. E. 374; *State v. Harris,* 134 Minn. 35, 158 N. W. 829.

Only three cases have been cited based upon statutes similar to the one here involved. In *Meyer v. Berlandi,* 39 Minn. 438, 40 N. W. 513, the statute discussed made the mere failure of a contractor, who had received pay from the owner, to pay the laborers and materialmen, a felony punishable by imprisonment in the penitentiary. There was no provision giving the laborer or materialman a lien on the property, or creation of a trust fund. In a very brief discussion by Mr. Justice MITCHELL the statute was held unconstitutional as imposing imprisonment for debt. Afterward a statute was enacted providing that if the contractor or subcontractor, with intent to defraud, should use the proceeds of any payment made to him on account of improvements by the owner of real estate, for any other purpose than the payment for labor, material, etc., while such labor or materials remained unpaid for, he would be guilty of larceny. This statute, like the one we are now considering, had reference to the mechanics' lien statutes, and was evidently passed

to prevent the abuses sought to be remedied by the one in question. The same objections were raised that are now urged, and it was held that the statute did not make an improper classification and did not call for imprisonment for debt, and its constitutionality was upheld.

In *State v. Hertzog,* 92 S. C. 14, 75 S. E. 374, a statute similar to the one here involved was enacted, but differed in that the statute, instead of creating a trust fund, gave to laborers and others a first lien on the money received by the contractor and imposed a penalty of fine or imprisonment upon the contractor for failure to pay the laborers and materialmen the money thus received. In this case it was held that the classification did not violate the constitution and that the statute did not impose imprisonment for debt.

In determining whether a statute is constitutional there are certain fundamental rules which must govern. Statutes are to be upheld by the courts unless unconstitutional beyond any reasonable doubt.

The legislature has all legislative powers not withheld or limited by the constitution of the state or the exercise of which is not prohibited by the federal constitution.

It is not the province of the courts to set aside statutes merely because they may be deemed unwise or because it may be feared that they will work inconvenience or hardship. Subject to the limitations imposed by the constitution the legislature has very broad powers in order to promote the public welfare, to create criminal offenses and impose punishment therefor. These are rules so elementary and long established that it is unnecessary to cite the many adjudicated cases on which they are based.

It is our conclusion that the objections of counsel for plaintiff in error are not well taken and that we are not justified in declaring the act unconstitutional.

The issues presented call for a decision on the meaning of the words, "persons entitled to a lien under this chapter." For plaintiff in error it is claimed that the words only refer

to those who have served notice of claim for lien. On the other hand, it is claimed by counsel for defendant in error that the clause refers to all persons "who do any work or furnish any material as embodied under the lien law, whether or not they attempt to perfect said lien, and they become entitled to the benefit of said section when the services are performed or the material is furnished; and it is optional with them whether they perfect the same by giving the necessary notice."

We do not entirely agree with the claim made by counsel for either party. As we construe the language of the statute, it refers to all persons who may be entitled to claim the benefit of the lien law, but it could hardly have been the legislative intent that the clause in question should refer to those who have lost their right to claim a lien by neglecting to file any notice within the statutory period. Nor do we think the legislature could have intended that the clause should be construed so strictly as to include only those who had actually filed the notice of lien at the time of the diversion of the trust fund. Such a construction would enable a contractor to obtain money from the owner and misappropriate it before the time for filing notices had expired or before the amount due laborers or materialmen had been ascertained, and thus the object of the statute would be defeated.

In the present case there is no testimony showing when the material and labor were furnished; therefore we cannot say from the record before us that any crime has been committed. We can only decide that upon the record as made the prisoner should have been discharged.

By the Court.—Order reversed, and cause remanded with direction to discharge the prisoner from this charge.

ESCHWEILER, J. I concur in the result reached in this case, namely, the reversal of the order and the discharge of the plaintiff in error. I cannot, however, agree with the

conclusion expressed in the majority opinion as to the constitutionality of sub. 3, sec. 3315, Stats. First, I think no conviction should in any event be allowed to stand under the statute as now worded, because it fails to require proof that such alleged misapplication of the funds received by the contractor from the owner is done with an unlawful intent, and the reference in that statute to the embezzlement statute is not sufficient to make this statute complete by such reference or by implication. Second, I think the statute in question attempts to do, indirectly at least if not directly, that which is prohibited by sec. 16, art. I, Const., which provides: "No person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied."

The obligation of the principal contractor towards the subcontractors and materialmen for services rendered or materials delivered is a contract obligation of the simplest and plainest kind. A statute, therefore, attempting to provide that the failure of a person for whom services had been rendered or materials delivered to pay for the same should be denominated a felony and punished by imprisonment would be a clear violation of the provision above quoted, or else the constitution in that regard is an idle waste of words.

By express agreement the principal contractor himself or his surety may lawfully undertake with an owner that such contractor and his surety will, for a valuable consideration, pay to said subcontractors or materialmen money to become due them on account of their employment by the contractors, and such subcontractors and materialmen may maintain an action upon such contract although it may have been entered into without any consideration moving from them, and even without their knowledge or consent at the time of the making thereof. *New York C. J. F. Co. v. Kenosha,* 167 Wis. 371, 376, 167 N. W. 451, and cases there cited; *Builders L. & S. Co. v. Chicago B. & S. Co.* 167 Wis. 167, 169, 166 N. W. 320, being an application to this particular kind of contracts of the general rule so often repeated in this court

since *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440. Many of the subsequent cases on that rule are cited in *Sedgwick v. Blanchard,* 164 Wis. 421, 424, 160 N. W. 267. These all recognize the relationship that is here presented between the principal contractor as promisor, the owner as promisee, and the subcontractors or materialmen as beneficiaries as being a contract obligation, nowhere designating it as a trust relationship. The statute now being upheld by the majority punishes a breach of such contract obligation by imprisonment in what seems to me to be a disregard of the letter and the spirit of the constitutional provision.

In *Bailey v. Alabama,* 219 U. S. 219, 31 Sup. Ct. 45, the United States supreme court declared unconstitutional the so-called peonage law of Alabama, which by the supreme court of that state had been declared constitutional as reported in 161 Ala. 75, 78, 49 South. 886. The federal court said (p. 238) as follows:

"We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured."

Here as there the real purpose of the statute is to provide means of forcing payment of a debt by threatened confinement in the penitentiary of those who fail to perform that which is a simple and plain contract obligation.

HEMENWAY, Appellant, vs. CONNOR LUMBER & LAND COMPANY, Respondent.

November 15—December 13, 1921.

Logs and logging: Claim of teamster: Promise of owner to pay: Conditional agreement: Claim for lien: Failure to file because of act of owner: Evidence: Sufficiency.

1. Where defendant expressed a willingness to pay plaintiff's claim for logging work done for one of its contractors if plaintiff would furnish an itemized statement of the time he and his team were engaged on the work, and the plaintiff did not do this, there was not an unconditional promise of the defendant to pay the claim.
2. Since the evidence does not show any agreement on the part of plaintiff to refrain from asserting his lien against the logs, and after he had made final demand of the defendant six days still remained within which he might file his lien, it is *held* that plaintiff was not induced to forego his lien by reason of the negotiations with defendant.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Affirmed.*

Action for breach of contract. The facts are set forth in the opinion.

For the appellant there was a brief by *Lehner & Lehner* of Oconto Falls, attorneys, and *Otto L. Lehner* of Madison, of counsel, and oral argument by *Philip Lehner* of Princeton.

For the respondent there was a brief by *Goggins, Brazeau & Goggins* of Wisconsin Rapids, and oral argument by *Hugh W. Goggins.*

DOERFLER, J. This is an action on contract brought by the plaintiff, *Hemenway,* against the defendant, *Connor Lumber & Land Company,* to recover for the alleged reasonable value of labor of the plaintiff and of his team in decking and loading logs for one Russell Collins, the principal contractor under said defendant.

Plaintiff claimed that he entered into an agreement with

said Collins by which Collins agreed to pay him $1.25 per thousand feet for the loading and decking of certain logs. The work was performed during the winter of 1916-1917, and the plaintiff ceased working on April 5, 1917. Thereafter Collins gave the plaintiff an order upon the defendant for $660.10, alleged balance due the plaintiff, which order the plaintiff presented to one Kissinger, the manager of the defendant's plant at Laona, Wisconsin, and this order was not honored by said Kissinger for the reason, as was claimed, that there was no money due said Collins.

On April 7, 1917, correspondence pertaining to plaintiff's claim opened between the parties, and from such time until the 28th day of May, 1917, numerous letters passed between them, and such correspondence constitutes substantially all the material evidence in the case. The plaintiff requested payment of his claim, and the defendant from time to time insisted that the plaintiff furnish an itemized statement of the actual time he and his team were engaged in performing the work in question. Pursuant to defendant's request for such itemized statement the plaintiff mailed to the defendant a statement containing numerous items, the principal item being one in which the plaintiff made a charge of $860.10 for loading and decking logs at $1.25 per thousand. To this statement so sent the defendant took exception, and repeatedly called plaintiff's attention to the fact that such statement did not comply with its request. The statement requested was never furnished.

On May 26, 1917, the plaintiff sent the defendant an ultimatum by which he informed the defendant that, unless the defendant mailed him a check for the amount of plaintiff's claim by return mail, he would enter the same for collection. Plaintiff's claim was not paid, and on June 4, 1917, the action was begun.

The issues involved were submitted to a jury on a special verdict, in which the jury found (1) that the plaintiff

worked for seventy-three days; (4) that the going wage in Forest county for work such as the plaintiff claimed to have performed was $5 per day; (3) that the plaintiff's team worked for seventy-three days; (4) that the going wage for such services at the place of performance was $3 per day (the latter question being answered by the court); (5) that the plaintiff was induced to refrain from filing his petition for a lien by reason of the correspondence had with the defendant company; (6) that the plaintiff did not have a reasonable time in which to file his petition for lien between May 26 and June 1, 1917.

Under the provisions of sec. 3330 of the Statutes the time for filing a claim for lien by the plaintiff expired on the 1st day of June, 1917. Assuming that the plaintiff had a valid claim for lien under the provisions of said statute, or if plaintiff had contended in good faith, during the negotiations, that he was entitled to a claim for lien, and if the defendant, in order to avoid a lien claim, had promised to pay plaintiff's claim upon the condition that plaintiff would refrain from asserting his lien rights, such promise of the defendant would be enforceable against it. It nowhere appears, however, in the correspondence that plaintiff laid claim to lien rights; on the contrary, he threatened collection of his claim unless defendant paid him within a certain time. Assuming, however, that the plaintiff had made claim to lien rights, it nowhere appears that the defendant unconditionally agreed to pay plaintiff's claim. On the contrary, it appears affirmatively that the defendant insisted from time to time upon plaintiff's furnishing a statement of the actual time of work and labor performed by him and his team. Plaintiff's attention was repeatedly directed to the necessity of furnishing such statement. Inasmuch as the defendant expressed a willingness to pay plaintiff's claim only upon condition that the requested statement be furnished, and such statement in fact having never been furnished, there was no unconditional

promise on defendant's part to pay. Furthermore, the evidence does not show that there was an agreement on the part of the plaintiff to refrain from asserting his lien claim.

In that respect this case differs materially from the case of *Young v. French,* 35 Wis. 111. In that case the defendant agreed to become individually responsible for plaintiff's claim, and agreed to pay the same if the plaintiff would forbear to sue or desist from enforcing a claim for lien. The court in its opinion uses this language:

"Assuming that these facts were established by the evidence, the question arises, Was the defendant's promise valid? We think the question must be answered in the affirmative. The promise was founded upon a new and distinct consideration moving from the plaintiff to the defendant." *Dyer v. Gibson,* 16 Wis. 557; *Hewett v. Currier,* 63 Wis. 386, 23 N. W. 884.

It is also contended by the plaintiff that the defendant at all times had the itemized statement requested by it and that therefore plaintiff was not obliged to furnish such statement. The evidence shows that Collins, the principal contractor, had a time-book showing the time that plaintiff and his team were engaged in the work in question, and this time-book, which constituted the only record evidence of such time, was in Collins's possession and was not delivered or shown to the defendant until the time of the trial.

The evidence in question cannot by any stretch of the imagination be construed as proving that the plaintiff was induced not to file his claim for a lien in time by reason of the correspondence had with the defendant company; and it also appears quite clearly that after the 26th day of May, 1917, the plaintiff still had adequate time within which to file a claim for lien had he desired to do so. The trial court therefore was justified in changing the answers to the questions of the special verdict as above set forth and in directing judgment for the defendant.

By the Court.—Judgment affirmed.

OCONTO CHAMBER OF COMMERCE, Respondent, vs. GRANDALL, Appellant.

November 15—December 13, 1921.

Subscriptions: Assignment by parol: Evidence: Parol evidence where instrument is unambiguous.

1. A committee of citizens, procuring subscriptions to purchase a factory building and site to give to a manufacturing company to induce its coming to the city, could, without formal writing, assign whatever interest the committee had in the subscriptions so as to authorize the assignee to sue for an unpaid subscription.
2. Under such a subscription agreement parol evidence was proper to show that the express obligation of the subscribers included the price actually paid for a certain building and site in the city, but was not admissible to show that, in addition, there was a sum of $5,000 expended in improving and changing such building after its purchase, as the contract was unambiguous and plainly did not include such remodeling or raising money therefor.
3. When parties reduce their agreements to writing, the measure of their obligation is, when plainly expressed, to be confined to what is there stated, and cannot be added to by parol.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Modified and reversed.*

The citizens of Oconto being desirous of securing the location of a factory, a committee undertook to raise a sum of money by circulating a subscription list as follows:

"Oconto, Wis., June 9, 1913.

"Whereas, H. F. Jones, D. H. Mooney, J. B. Chase, A. M. Martineau, Chas. A. Best, L. C. Harvey, George Ansorge, and W. M. Comstock are about to become obligated for the purchase price of a building and site in Oconto, Wisconsin, to be given to a corporation for factory purposes at the end of five years' time providing said corporation operates said factory pursuant to the terms of a contract to be entered into with said manufacturing corporation; and

"Whereas, it is understood that an effort shall be made to

get the city of Oconto, Wisconsin, to supply the necessary funds; and

"Whereas, it is necessary, in order that the factory be obtained for this city, to act immediately,

"Therefore we, the undersigned, hereby guarantee to the person, persons, or corporation advancing the funds, or to their assigns, that we will reimburse such person, persons or corporations, or their assigns, for all sums so advanced by them, and that each of us shall become liable to such person, persons, or corporations, or their assigns, up to the sum of not exceeding $100 each, such payments to be made within five years' time, one fifth of the amount of the liability payable annually. It is understood that if any signer to this paper desires to become liable for a greater amount than $100 he may do so by specifying amount over his signature and hereby binds himself for such greater sum."

The defendant and a number of others signed, the total amounting to $7,980 and being completed before June 23d. A site and building known as the Turner Opera House in said city was purchased for $3,500 by the committee and possession thereof given to the Marinette Knitting Mills Company pursuant to the terms of two substantially similar written agreements between them of June 23d and July 9th. Upon performing certain conditions within five years the Mills Company was to obtain title to such site. These writings also contained two separate and distinct provisions in separately numbered paragraphs. By the first provision the committee undertook to obtain title in themselves and then give immediate possession to the Knitting Company of the real estate with buildings thereon known as the Turner Opera House property "for said factory site and purposes." The second is that the committee are to furnish and give, as needed and requested by the Knitting Company, $5,000 within certain dates "to remodel, equip, and complete said premises for factory purposes." By agreement between those concerned, the plaintiff organized subsequently to June 23d, took title to this property from the committee and collected on the subscriptions.

This action was brought by plaintiff, claiming as an assignee of the committee, to collect a balance of $80 on defendant's $100 subscription.

Upon motion for a directed verdict the court directed judgment for the plaintiff for the $80, with interest and costs. From such judgment the defendant has appealed.

For the appellant there was a brief by *Classon & O'Kelliher* of Oconto, and oral argument by *V. J. O'Kelliher.*

Irving Breakstone of Oconto, for the respondent.

ESCHWEILER, J. The defendant urges that there is not sufficient proof that the plaintiff, the *Oconto Chamber of Commerce,* which assumed the duties and functions of the committee named in the subscription list quoted above, had sufficient title or interest in such agreement to support its bringing this action. No formal writing or assignment appears in the record as having been executed by the committee to the plaintiff, yet we think the facts in this case, which we do not deem necessary to recite in detail, were sufficient to show that there was in legal effect a sufficient assignment of whatever interest the committee had in the subscriptions. Such an assignment need not be in writing. *Arpin v. Burch,* 68 Wis. 619, 623, 32 N. W. 681; *Baillie v. Stephenson,* 95 Wis. 500, 502, 70 N. W. 660; *Skobis v. Ferge,* 102 Wis. 122, 129, 78 N. W. 426.

The obligation in the subscription agreement of June 9th included, by its express language, the sum expended for the "purchase price of a building and site." No contention can be successfully made that there was any latent ambiguity in that phrase. It is plain, certain, and of ordinary usage. Parol evidence was proper to show, and only to show, that it fitted the Turner Opera House property and the $3,500 paid therefor. It also met and fitted exactly with the first provision in the contract with the Knitting Mills Company as above recited.

The court, however, permitted, over defendant's objec-

tion, parol evidence to be received that in addition to such purchase for $3,500 there was a sum of $5,000 expended in improving and changing such building after its purchase and to make it practicable for factory operations, and that such additional sum added to the $3,500 required an application of the entire amounts subscribed.

Such sum of $5,000 was, however, plainly separate and distinct from the obligation for the purchase of the real property and clearly not included therewith.

The holding of the court was contrary to the salutary and well recognized rule that when parties reduce their agreements to writing the measure of their obligations is, when as plainly expressed as here, to be confined to what is there stated and cannot be added to by parol. *Miley v. Heaney,* 168 Wis. 58, 78, 169 N. W. 64; *State ex rel. Att'y Gen. v. Steber,* 161 Wis. 576, 580, 155 N. W. 146; *Kilpinski v. Bishop,* 143 Wis. 390, 127 N. W. 974; *Gilbert v. Stockman,* 76 Wis. 62, 44 N. W. 845; *Taylor v. Davis,* 82 Wis. 455, 458, 52 N. W. 756; Jones, Evidence (2d ed.) § 434.

There is no room here for the application of the rule that parol evidence may be received to raise an ambiguity even where the language of the writing seems clear on its face, and then to explain such ambiguity, as in cases like *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43; *Hammond v. Capital City Mut. F. Ins. Co.* 151 Wis. 62, 67, 138 N. W. 92; *Radtke v. Rothschild W. P. Co.* 158 Wis. 271, 276, 148 N. W. 866; and as stated in Jones, Evidence (2d ed.) § 455.

Defendant, however, paid but $20 on his subscription. It is conceded that he is indebted for his proportionate share of the $3,500 paid for the Turner Opera House property. Such share would be $43.85. The difference between that and the $20, or $23.85, is the amount justly due and owing from him to the plaintiff. That amount of $23.85, instead of $80, should be the measure of damages, with interest

from the commencement of the action, there being no proof as to any particular date of a prior demand.

The plaintiff, of course, would be entitled to costs in the court below, and defendant would necessarily be entitled to costs here.

By the Court—Judgment reversed, with directions to enter judgment in accordance with this opinion.

HESS, Respondent, vs. HOLT LUMBER COMPANY, Appellant.

November 15—December 13, 1921.

Contracts: Offer and acceptance: Qualified acceptance: Offer by mail: How accepted: Withdrawal of offer by telegraph.

1. If an acceptance of an offer to sell timber, mailed before the offer was withdrawn, was insufficient to make a valid contract, no valid contract could thereafter be made by accepting the offer.
2. An offer to sell timber having been made by post, the acceptance might be made in the same way; and the acceptance of the offer was complete from the moment the letter of acceptance was mailed by the offeree.
3. Where an offer to sell timber did not specify the time, place, or medium of payment nor the time within which the timber was to be removed, if the offer had been accepted without qualification payment should be made to the vendor at its place of business in cash; and the purchaser would have had a reasonable time within which to remove the timber.
4. But if the offer was accepted with a demand for one year's time within which to remove the timber, and the length of time within which it might have been removed in the ordinary course of business was not shown, there was such a material variation from the terms of the offer as rendered the acceptance qualified and prevented a completed contract from being created by the mailing of the letter.

APPEAL from a judgment of the circuit court for Forest county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Specific performance. The plaintiff lives at Cavour, For-

est county, and the defendant has its principal office at Oconto, Wisconsin, and owns timber lands in Forest county. On August 28, 1919, plaintiff wrote to defendant as follows:

"About a week ago I spoke to your cruiser, Mr. Leigh, about a little bunch of stuff left on the N.E. of S.W., N.W. of S.E., sec. 19–37–16 E., which I would like to buy if I can buy it right away, as I would want to cut it before snow fell, and in order to do that I would have to get busy because men are scarce.

"Let me know at once."

In reply the defendant wrote on September 2d that the plaintiff could have the timber for $100 cash. On September 12th the plaintiff wrote defendant:

"Send timber deed to Laona State Bank, of Laona, Wis., for $100 for what timber is left on the N.E. of the S.W. and the N.W. of the S.E. in sec. 19–37–16.

"Make same to L. C. Hess."

On September 15th the defendant wrote the plaintiff as follows:

"We notice that we made a mistake in writing you that we would sell you the timber on the N.E. S.W. and the N.W. S.E. section 19, town 37, range 16, for $100. This should have been $150. Kindly advise us whether you want it at that price or not. We would not be willing to sell it for $100."

On September 17th plaintiff wrote the defendant:

"Find inclosed check for $150 for the timber on the N.E. of S.W. and the N.W. of S.E. of sec. 19–37–16 E.

"Send timber deed to me and have same made out to L. C. Hess, single man. If this was a mistake of yours I ought not to pay this extra fifty dollars.

"Yours truly, A. J. HESS.

"P. S. I want one year to remove this timber."

In the afternoon of September 17th the defendant telegraphed the plaintiff at Cavour: "Our quotation on timber in section 19 is hereby withdrawn."

It appears that the telegram was not delivered until the following day about 11 o'clock. On September 17th the defendant also wrote the plaintiff:

"We hereby withdraw our quotation of $150 for the timber on the N.W. S.E. and N.E. S.W. section 19, town 37, range 16, and we sent you a telegram to the same effect. We have concluded not to sell the timber at that price."

There was subsequent correspondence from which it appears that the reason the defendant withdrew its offer was that it had received an offer of $350 for the land. Plaintiff wrote demanding deed, which demand was refused. This action was begun to compel the defendant to convey the timber. There was judgment for the plaintiff, from which the defendant appeals.

For the appellant there was a brief by *Classon & Whitcomb* of Oconto, and oral argument by *A. J. Whitcomb.*

For the respondent the cause was submitted on the brief of *J. A. Walsh* of Crandon.

ROSENBERRY, J. The defendant claims that the court erred for the reason that the letter of September 17th did not amount to an acceptance, as there was a material variation from the terms of the offer. Considerable evidence was offered and received as to the conduct of the parties subsequent to the receipt of the letter by defendant. We regard all of this evidence as immaterial, for the reason that before the letter of acceptance was received by the defendant it had withdrawn its offer. If there was a valid, enforceable contract, it must have been made by the acceptance mailed by the plaintiff on September 17th, and if the letter did not make a valid contract, the offer having been withdrawn, none could thereafter be made. It is not disputed that the parties had made the post a means of communicating offer and acceptance. The offer having been made by post, the acceptance might be made by post. The contract, if one was made, was complete from the moment the letter was mailed

by the plaintiff to the defendant. 1 Page, Contracts (2d ed.) § 199; 13 Corp. Jur. p. 300, § 116. The offer was to sell the timber upon the land in question for $150. The time, place, and medium of payment were not specified, nor was the time within which the timber was to be removed fixed by the offer. If the offer had been accepted without qualification, payment should have been made to the vendor at its place of business in cash, and the plaintiff would have had a reasonable time within which to remove the timber. The words of acceptance were, "Find inclosed check for $150 for the timber" on the lands described and a demand for one year's time within which to remove the timber and a direction to have the deed made to L. C. Hess.

The direction as to the making of the deed to L. C. Hess may be considered as having been assented to by the defendant, it having been suggested in a prior letter and no objection having been made thereto.

No evidence was introduced or received as to the length of time within which the plaintiff might have removed the timber in the ordinary course of business. In the absence of such evidence, we are of the opinion that the demand of the plaintiff that he be given one year within which to remove the timber was such a material variation from the terms of the offer as to make it a qualified acceptance requiring something to be done on the part of the defendant; that therefore no completed contract was made by the mailing of the letter.

In *Cram v. Long,* 154 Wis. 13, 142 N. W. 267, it was held that a contract made by an agent by the terms of which the purchase price was to be paid to the agent instead of to the principal varied the terms of the offer and amounted to a qualified acceptance.

In *Northwestern Iron Co. v. Meade,* 21 Wis. 474, M. offered by letter to sell W. forty acres of land for $10 per acre, subject to two years' taxes. W. replied, agreeing to pay "what you ask—$400 and two years' taxes," and added: "If this is the best offer you can make, you may execute the

within deed, and send it to Mrs. M. at Green Bay to also sign and acknowledge, requesting her to forward it to the State Bank of Wisconsin in Milwaukee, where I will call and pay the money and receive the deed." It was held that M. would have had a right to tender his deed at W.'s place of residence, which was at Mayville; that W.'s letter having fixed a different place for the delivery of the deed and the payment of the money, it was a qualified acceptance and no contract was made.

In *Helmholz v. Greene,* 173 Wis. 306, 181 N. W. 221, where an offer was communicated by a broker to the owner and the owner accepted by telegram: "Accept nine thousand cash, purchaser to pay commission and satisfy tenant with whom I have only tentative agreement," it was held a qualified acceptance and did not create a binding contract.

In *Clark v. Burr,* 85 Wis. 649, 55 N. W. 401, A. gave an option to B. to buy certain land, after which a building upon the land burned. The defendant accepted the option and in a separate writing demanded that the insurance money on the building be paid to him or applied on the purchase price. In this case both parties claimed there was a contract. It was there said:

"The acceptance of an offer upon terms varying from those of the offer, however slight, is a rejection of the offer." Citing *National Bank v. Hall,* 101 U. S. 43, 50.

For further instances of qualified acceptance see *Shores L. Co. v. Patterson,* 98 Wis. 534, 74 N. W. 367; *Baker v. Holt,* 56 Wis. 100, 14 N. W. 8; *Turner v. McCormick,* 56 W. Va. 161, 49 S. E. 28, 107 Am. St. Rep. 904; *Russell v. Falls Mfg. Co.* 106 Wis. 329, 82 N. W. 134; 1 Page, Contracts (2d ed.) §§ 167–184.

For cases holding that an inquiry or suggestion not amounting to a condition of acceptance is not a material variation, see *Matteson v. Scofield,* 27 Wis. 671; *Kreutzer v. Lynch,* 122 Wis. 474, 100 N. W. 887; *Curtis L. & L. Co. v. Interior L. Co.* 137 Wis. 341, 118 N. W. 853.

The acceptance by tender of a check of a third party for

$150 presents an interesting question which we do not find it necessary to decide. In that connection attention is called to *State ex rel. News P. Co. v. Park,* 166 Wis. 386, 165 N. W. 289; Anno. 8 A. L. R. 1268; Anno. 11 A. L. R. 811.

From what has been said it follows that the court erred in granting specific performance, there being no valid contract.

By the Court.—Judgment of the circuit court reversed, and cause remanded with directions to dismiss the complaint.

O'SHEA, Respondent, vs. LAVOY, Appellant.

November 15—December 13, 1921.

Automobiles: Liability of owner to invitee: Negligence: Degrees.

1. The owner of an automobile is not liable for damages to an invited guest riding therein for injuries sustained by the latter, due to the turning over of the machine because of a defective spring, even though it was a second-hand machine and the spring was repaired with old parts.

[2. The question as to what degree of negligence in the *management of an automobile* by its owner will make him liable for damages to an invited guest riding therein and sustaining injuries, discussed but not decided.]

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

The plaintiff is the father-in-law of the defendant and is about seventy-two years of age. Both reside at Marinette, Wisconsin. On July 18, 1920, the defendant started in a Chalmers automobile on a trip to Norway, Michigan, for the purpose of bringing home one of his children who had been visiting at that place. He took with him his wife, two children, his niece, another lady, and the plaintiff and his wife, whom he invited to make the trip with him. The car was a 1915 model. Defendant had purchased it as a second-hand

car in 1919. Sometime prior to this date four leaves of the left front spring broke and defendant took the car to a garage and had the spring repaired. The broken leaves were the second, third, fourth, and fifth from the bottom, there being seven leaves in the spring. The garage man substituted some old leaves which he had in the shop for the broken ones and thus repaired the spring. He took some leaves he had in the garage that were a litle bit too long, cut off the tapered ends and fitted them the same length as the ones that were broken. This was regarded as a temporary job and a new spring was ordered. The garage man told defendant that it would not be good policy to run the car too long with the repaired spring, but that it would be safe as long as he watched himself on the road. The garage man testified that he knew the defendant intended to use the car in an ordinary way and that he considered it entirely good and adequate, temporarily, for that purpose. He further testified that there was nothing unusual about using a repaired job on a spring temporarily before a new spring arrives. In fact, it was quite common to do that in that vicinity. He further testified that any part of a car that is made of steel is apt to crystallize after four or five years' use. Between the time of the repair of the spring and the trip in question defendant ran the car a distance of 1,500 miles, making one trip from Marinette to Milwaukee therewith without any mishap.

While on the trip to Norway they passed over a small bridge near the village of Daggett, Michigan, going at the rate of fifteen to eighteen miles an hour. Almost immediately thereafter the master (top) leaf of the spring broke very near the front end thereof, where it had no support from the other leaves. This caused the left side of the car to drop down, the fender coming in contact with the tire, which made it impossible to turn the car, which at that time was turned a little to the left, and the car slid a short distance and toppled over the edge of the road and down an embankment.

turning completely over, causing injury to the plaintiff, to recover damages for which this action was brought.

The defendant testified that when the leaves broke on the former occasion it did not let the fender of the car down onto the front wheel, and that he did not know that such a result would follow from a breaking of the master leaf.

The material allegations of the complaint were to the effect that plaintiff was riding with the defendant in said car as the defendant's invited guest along a public highway, and that said defendant was then and there driving said automobile at an excessive rate of speed and the said left front spring of the automobile was defective, which fact was well known to the defendant for a long time prior to said date, and which said fact was entirely unknown to this plaintiff; that while it was so driven the said left front spring of said automobile broke, and by reason thereof the said car was thrown over a high embankment, through said defendant's carelessness and negligence. Upon the trial the complaint was amended by striking out the words "at an excessive rate of speed" and the words "at an ordinary rate of speed" were inserted instead, so that the only negligence on the part of the defendant relied upon at the trial was the using of the automobile with the defective spring, which it was alleged was well known to the defendant for a long time prior to said date.

The jury returned a special verdict in which it was found that the defendant was negligent in using the car at the time in question in the condition it then was; that such negligence was the proximate cause of plaintiff's injuries; that no want of ordinary care on the part of the plaintiff proximately contributed to his injuries; that plaintiff did not voluntarily assume the risk of any danger arising out of the operation, with ordinary care, of defendant's car in the condition in which it was at the time when the trip was commenced; and that the damages sustained by plaintiff were $4,800. Upon this verdict judgment was entered in favor of the plaintiff

and against the defendant. From the judgment so entered defendant brings this appeal.

For the appellant there were briefs by *Richmond, Jackman, Wilkie & Toebaas* of Madison, and oral argument by *Harold M. Wilkie.*

For the respondent there was a brief by *George Evans* of Marinette and *Martin, Martin & Martin* of Green Bay, and oral argument by *Mr. Gerald F. Clifford* of Green Bay and *Mr. Evans.*

OWEN, J. The automobile is an instrumentality of recent creation which has rapidly established itself in the desires of the people. No other agency has so effectively appealed to their favor. Nothing contributes so much to the comfort and pleasure, the welfare and happiness of the family. It has given a new idea to distances and materially enlarged the orbit of individual existence. It affords recreation which appeals to every member of the family and pleasures which may be indulged by the family unit. It is a minister of health as well as pleasure. It makes the fresh air of the country available to the citizen of the congested city and brings the pleasures of the city within the reach of the rural inhabitant. There are many who cannot afford to own an automobile. There are few who do not covet the comfort, pleasure, and recreation afforded thereby. It is an act of kindness and consideration for the owner of a car to lend its comfort and pleasure through an invitation extended to his less fortunate neighbor for a ride in the country, to join a picnic party, or to enjoy an evening at the theater in the near-by city. This is a species of hospitality which should be encouraged rather than discouraged, and the law should not couple with this friendly act a duty which makes its exercise an unreasonable hazard. On the other hand, he who takes his friends and neighbors into his automobile places them in a high-powered, swiftly-moving vehicle attended with great danger unless handled and operated with

a requisite degree of care. He must realize that he has voluntarily received into his keeping the lives and safety of his passengers, and he should not be permitted to trifle therewith or to renounce all responsibility in such respect.

Upon these general observations we apprehend there is little difference of opinion either in law or in human conscience. The difficulty arises in announcing in concrete form, with some degree of definiteness and workability, the exact extent and nature of this duty. It is a question that has not been discussed or decided by this court. While there are numerous decisions elsewhere, the question is nevertheless of recent origin, and the courts are not in complete accord in their method of its treatment, although there may not be a great practical divergence in the conclusions reached.

It has been held that the owner of a conveyance is liable to an invited guest, who sustains injuries while riding with him, only for gross negligence. *Moffatt v. Bateman*, L. R. 3 P. C. 115; *Coughlin v. Gillison*, [1899] 1 Q. B. 145; *Avery v. Thompson*, 117 Me. 120, 103 Atl. 4; *Epps v. Parrish* (Ga.) 106 S. E. 297. It has also been held that he is liable for ordinary negligence. *Siegrist v. Arnot*, 10 Mo. App. 197; *Perkins v. Galloway*, 194 Ala. 265, 69 South. 875; *Mayberry v. Sivey*, 18 Kan. 291.

There is a line of cases holding that the situation gives rise to the relation of licensor and licensee; that the owner is not bound to furnish a sound vehicle or a safe horse, but is liable for active negligence which increases the hazard or creates a new one. *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. Supp. 221; *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886; *Beard v. Klusmeier*, 158 Ky. 153, 164 S. W. 319; *Fitzjarrell v. Boyd*, 123 Md. 497, 91 Atl. 547.

In Massachusetts it is held that while the legal relation arising between the owner of the automobile and his invited guest is that of licensor and licensee, it is also that of bailor and bailee, the nature of the bailment being that of a gratuitous *mandatum*, and that the owner is liable only for his

acts of gross negligence. *West v. Poor,* 196 Mass. 183, 81 N. E. 960; *Massaletti v. Fitzroy,* 228 Mass. 487, 118 N. E. 168.

A study of the cases, however, reveals a greater consensus of judicial opinion upon the degree of care which should be required of the owner of the automobile under such circumstances than is indicated by the above statement. For instance, in the states holding that the owner is liable for ordinary negligence there is but one degree of negligence recognized. In such states the care which an individual is required to exercise under any particular circumstances is ordinary care, and a failure to exercise the care required constitutes negligence.

In the above cited cases holding that the measure of the duty owing by the owner of the automobile is the same as that which a licensor owes to a licensee, the conduct which brought liability to the owner was rash and reckless, approaching if not constituting gross negligence under our definition of that term. It is to be remarked, however, that the practical application of the doctrine of those cases, that the owner is liable for his active negligence which increases the danger or creates a new one, makes him liable for acts which amount to no more than ordinary negligence. For illustration see *Lowell v. Williams,* 183 App. Div. 701, 170 N. Y. Supp. 596. The doctrine of the Massachusetts cases plainly holds the owner liable only in cases of gross negligence, as the term is understood in that state. But gross negligence, as understood in Massachusetts, comprehends a lesser degree of negligence than is included within our definition thereof.

Thus, it will be seen that the courts have held the owner liable only for a degree of negligence which approximates, but probably is less than, gross negligence, as defined by this court. This may be a just measure of responsibility to place upon the owner. But the problem which confronts us is to devise a rule which will accomplish that result. Would it be

a just rule to hold the owner liable only for gross negligence as known to the jurisprudence of this state? Would this lay upon the owner a just measure of responsibility? Can the status of a gratuitous mandatary logically be imputed to one who transports human beings from place to place? Furthermore, does the rule of liability obtaining between licensor and licensee, which rule is intended to apply principally with reference to the condition of premises, establish a correct measure of responsibility with reference to the operation of an automobile? Would not that rule lead to liability for acts of ordinary negligence, and if so, is that a just rule?

But the question of the liability of the owner of an automobile for damages resulting to his invited guest who is riding therein by reason of his negligent management thereof is not before us in this action and will not be decided. The foregoing discussion is indulged for the purpose of inviting the attention of the profession to the many aspects of the question which must influence the eventual determination thereof, with a view of directing their discussion into helpful channels when they shall have occasion to present that question to the court.

In this case the damage resulted from a defective spring on the automobile. Negligent operation thereof is not claimed. We can see no difference between an invitation extended by a person to dine with him and an invitation extended to ride with him. It has been held by this court that in the former case the legal relation arising was that of licensor and licensee. *Greenfield v. Miller,* 173 Wis. 184, 180 N. W. 834. It follows that the same relation arises in the latter case, which conclusion is supported by authorities already cited. Whether or not the established rules of liability existing between licensor and licensee are applicable in the matter of the *management* of the automobile, they plainly are applicable so far as the *condition* of the automobile is concerned. According to those rules the guest accepts the premises of his host as he finds them, subject only

to the limitation that the licensor must not set a trap or be guilty of active negligence which contributed to the injury. Here the accident happened, as said before, because of a broken spring, and the question is, Did that constitute a trap within the meaning of the rule? That is the only basis upon which liability can be predicated. A trap, within the meaning of this rule as we understand it, is a hidden danger lurking upon the premises which may be avoided if known. Hence it is the duty of the host to advise his guest of its presence so that the guest may enjoy the premises in a security equal to that enjoyed by the host. The guest has no right to a greater security than that enjoyed by the host or other members of his family. The host simply places the premises which he has to offer at the disposal and enjoyment of his guest upon equal terms of security.

In this case the defendant considered the automobile to be in sufficient condition to make the trip. This is evidenced by the fact that he not only intrusted his own safety thereto but that of his wife and children as well. There can be no stronger evidence of the belief of the ordinary well-meaning man in the sufficiency of the car to safely make the trip.

So we have a situation where the owner of an automobile who is about to make a pleasant trip, fully believing in the sufficiency of the car to do so with safety to the occupants, with the best of motives and with a view of promoting his pleasure, invites his father-in-law to ride with him, and by reason of the giving way of some part of the car the father-in-law sustains injuries. Under such circumstances it is clear to us that the father-in-law in accepting the invitation took the car as he found it, was attended by the same measure of security enjoyed by the owner and the other members of his family, and that he was entitled to no more.

Were it material to the decision we would hold that, upon the record, we find nothing which should have led the defendant to believe that the car was unsafe to make the trip nor that he had any reason to anticipate the accident or the

resulting injuries. It is true he had a repaired spring, but he had driven the car 1,500 miles after it was repaired without any indication that it was insufficient in its repaired condition for the purposes to which he devoted the car at the time in question. Besides, it was not the repaired part that gave way. It was the master leaf of the spring, which up to that time had fully performed its service. There is no evidence that the leaves supplied by the repairer did not contribute as much strength to the spring as those which were broken. It is common knowledge that the giving way of most any part of a car that has been used for upwards of five years may be expected, and this we think is the only knowledge with which the defendant could be charged respecting the deficient condition of the car. But knowledge of this is not sufficient to render him liable to those whom he invites to ride with him for injuries resulting from the giving way of the various parts of the car. Furthermore, the accident was a most unusual one to result from the breaking of a spring, and, as we understand it, was due to the peculiar construction of this kind of car. The defendant testified that he did not know that the fender would engage the front wheel in case of the breaking of the front spring; and, if it were necessary to a decision of the case, the question of whether he should reasonably have anticipated the instant results from the breaking of the spring would be a serious one. However, we think neither of these latter questions is involved. We place the decision upon the ground that the owner did not fail in the performance of any duty which he owed to those whom he invited to ride with him. The consequence is that the plaintiff has no cause of action and the complaint should have been dismissed.

By the Court.—Judgment reversed, and cause remanded with instructions to dismiss the complaint.

HESS BROTHERS, INC., Respondent, vs. GREAT NORTHERN PAIL COMPANY, Appellant.

November 15—December 13, 1921.

Sales: Fluctuating prices as ground of repudiation: Excuse for nonperformance: Acts of superior authority: Embargo on freight shipments: Requested modifications as breach of contract: Waiver of minor breaches of agreement: Nondelivery of goods: Damages: Time of computation.

1. Great fluctuations in prices which have occurred in the past few years, while they furnish a motive, do not warrant repudiation of contracts of sale of goods.
2. Where delivery of goods is prevented by acts of superior authority (in this case an embargo on shipments west of Chicago), nonperformance is excused during the period of the inhibition; but the contract is not dissolved unless the inhibition will probably continue for such a period of time as will frustrate the object of the contract.
3. Where a carload of candy pails was ordered December 9, 1916, and defendant made repeated unconditional promises to perform, and did not notify plaintiff of any intention to repudiate until December 6, 1918, the latter date should be considered as the date of breach by defendant for the purpose of fixing damages.
4. Mere requests by the seller for changes or modifications of the contract, or objections to its terms, will not constitute a renunciation or repudiation of the contract when unaccompanied by a statement that it will be repudiated unless the changes or modifications are made.
5. A buyer at all times insisting on performance of a contract to deliver cannot claim damages for a breach as of an earlier date than the seller's unequivocal notice of repudiation, if, on account of fluctuating prices, such claim would be to the disadvantage of the seller.
6. In this case it is *held* that time was not of the essence of the contract, both parties having treated its performance as likely to be delayed and neither party treating it as abrogated or repudiated until long after the time fixed for its expiration.
7. Under sub. 3, sec. 1684*t*—67, Stats., the measure of damages for breach of a contract to deliver goods is the difference between the contract price and the market price at the time of breach.

8. The contract providing for a discount of two per cent. if payment was made within ten days on each shipment, the seller could not accept payment after such ten days with the two per cent. deducted without objection and later repudiate the contract on the ground that the taking of such discount breached the contract.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Modified and affirmed.*

The appeal is from a judgment in favor of the plaintiff for $403.51 and costs, damages resulting from an alleged breach of a contract to deliver a carload of candy pails.

On December 13, 1915, a contract was made whereby the defendant agreed to sell and the plaintiff agreed to buy plaintiff's entire requirement of candy pails, approximately five carloads, for the period from January 1, 1916, to December 31, 1916, delivery to be made in carload lots, as wanted, payment thirty days net, or two per cent. discount if paid within ten days from date of invoice. It was expressly agreed that the contract should be subject to certain conditions beyond the control of the parties, among others car supply and delay in transit.

On January 1, 1916, one carload of pails was shipped. On January 31st defendant received payment less two per cent. discount. On September 5, 1916, a second car was shipped. Remittance was made September 27th, the same discount being taken. On December 9, 1916, plaintiff sent a letter ordering a third car. Defendant replied to this letter January 3, 1917, stating that—

"An embargo has been placed on all shipments west of Chicago and has prevailed for the last thirty days, and for that reason we have been unable to ship you your car of pails. How long this embargo will last is unknown, and inasmuch as our contract ends January 1st we presume it will be satisfactory to consider the contract closed.

"Should you desire to take up the matter of a contract for 1917, it will be necessary for you to take the matter up at an early date."

Plaintiff replied on January 6th, stating that it was not satisfactory to consider the contract closed and that the car should be shipped as soon as the embargo was lifted. No answer having been received, plaintiff on April 9 and again on May 3, 1917, called attention to the order and requested shipment.

On June 11, 1917, defendant sent the following letter:

"Replying to your letter of May 30th, wish to say that we will make shipment on June 25th of car containing 50 dozen 30-lb. taper pails one inch short and balance of car with 30-lb. straight pails. Trusting this will be satisfactory to you, we remain."

In a letter dated July 23, 1917, defendant reiterated its intention to ship the car in the near future, "not because you threaten suit in the matter, but because we feel under obligations to fill the order, having received it in good faith before the first of the year."

The car was never shipped. On October 25, 1918, in reply to a letter from plaintiff, defendant offered to ship a carload of a different kind of pails, sight draft to be attached to bill of lading. This offer was refused, plaintiff saying it was not in accordance with the contract. On December 4th defendant again made the offer. On December 6, 1918, defendant, in answer to a letter from plaintiff's attorneys, definitely refused to ship under the former agreement, and gave as the reason that plaintiff had violated the agreement by deducting the two per cent. discount, and plaintiff was invited to bring suit if it desired.

The contract price of the carload of pails was $766.10, and the market price of the same on December 6, 1918, was $1,170.

The case was tried without a jury. The trial judge found that the contract was breached by the defendant and found the damages suffered by plaintiff to be $403.90. Judgment was ordered for that amount with interest from December 9, 1916.

George Hoxie of Gillett, for the appellant.

For the respondent there was a brief by *Lehner & Lehner* of Oconto Falls, attorneys, and *Otto L. Lehner* of Madison, of counsel, and oral argument by *A. J. Whitcomb* of Oconto.

JONES, J. The great fluctuations of prices during the last few years have brought about a flood of lawsuits. While such fluctuations have caused great loss to many persons who have contracted to buy or sell goods for future delivery, and while they afford a motive for attempting to avoid the effects of such contracts, they are clearly no cause for their repudiation. There would be little certainty or safety in such business transactions if a contrary rule prevailed.

It is urged by defendant's counsel that the so-called embargo afforded grounds for refusing to perform the contract. The trial court found that no embargo existed on Eastern shipments at the time defendant received plaintiff's order and that it existed only from December 18, 1916, until the first week in January, 1917.

There are many English cases holding that when the delivery of goods is prevented by acts of superior authority beyond the control of the person obligated to deliver, the nonperformance is excused during the period of the inhibition; but that the contract is not dissolved unless at the time it should have been performed there is a reasonable probability that the inhibition will continue for such a length of time as to frustrate the object of the engagement from a business point of view. See cases cited 3 A. L. R. 29.

Evidently neither party contemplated any such probability, for although in the letter of January 3, 1917, defendant suggested that it might be satisfactory to plaintiff to consider the contract closed, the plaintiff at once gave notice that it would not be satisfactory, and the later correspondence clearly showed that neither party treated it as closed.

There is no doubt but defendant renounced the contract. As bearing on the question of damages it is important to

determine when the renunciation took place. Plaintiff's counsel claim that the breach of contract occurred on December 6, 1918, when defendant wrote that plaintiff had not lived up to its part of the contract and unequivocally refused to make shipment. Appellant's counsel claim that the breach took place soon after July 23, 1917, since the defendant failed to ship the car which it then promised to ship in the near future. In other words, defendant relies on its own delay and nonperformance of the contract to minimize the damages.

It is plain that defendant never notified the plaintiff of any intention to repudiate the contract until December 6, 1918. On the contrary, it made repeated unconditional promises to perform. On October 25, 1918, defendant wrote asking for specifications of the car desired to be shipped and made an offer slightly modifying the previous arrangement, and on December 4th made another offer to ship a car but attached the condition that a sight draft should be attached to the bill of lading. It appears that there was some correspondence not included in the record. Thus it appears that from the execution of the contract until December 6, 1918, the correspondence relating to it continued, although with considerable intervals of interruption. During all this time plaintiff insisted upon performance and defendant did not repudiate the contract, although some modifications were suggested. There was no statement that the contract would be repudiated unless the changes or modifications were made, and mere requests for changes, or objection to the terms of the contract, do not constitute renunciation. 5 Page, Contracts (2d ed.) §§ 2903, 2904.

If defendant had desired to repudiate the contract in order to diminish damages, or for any other reason, it could have sooner given such unequivocal notice as it gave on December 6, 1918, and the plaintiff could have obtained its supplies elsewhere. If such notice had been given it would not have been just for plaintiff to claim damages for a breach as of an

earlier date, if on account of fluctuating prices such claim would be to the disadvantage of defendant, since plaintiff had been insisting upon performance. Nor can defendant complain that the action was not brought until plaintiff had notice of defendant's intention not to perform the contract.

It is clear that time was not of the essence of the contract. Both parties throughout treated its performance as likely to be delayed, and neither party treated it as abrogated or repudiated until the final letter of defendant.

In determining when breaches of contracts take place every case must be controlled by its own facts. We are convinced that in view of the correspondence and conduct of the parties the damages should be assessed as of the date when defendant repudiated the contract, December 6, 1918, and that the difference between the contract price and the market price at the time of refusal to deliver was the proper measure of damages. Sales Act (sub. 3, sec. 1684*t*—67, Stats.).

It is claimed by defendant's counsel that plaintiff breached the contract by making two discounts of two per cent. contrary to the terms of the agreement, and that this excused performance on the part of defendant. We do not consider this point well taken, for the reason that it plainly appeared from the books of defendant that the discounts had been deducted on January 31 and September 27, 1916, and no objection had been made until December 6, 1918, when it was decided to repudiate the contract. The plaintiff might well have believed that its course of dealing was satisfactory, and this branch of the defense was waived. *Wilbur v. Means*, 171 Wis. 401, 177 N. W. 575.

By some mistake or inadvertence the court allowed interest from December 9, 1916, instead of December 6, 1918. This mistake should be corrected and otherwise the judgment should be affirmed, with costs to be paid by respondent.

By the Court.—Judgment affirmed as modified.

FELTON, Appellant, vs. STACEY and wife, Respondents.

November 15—December 13, 1921.

Vendor and purchaser: Construction of contract: Purported duplicates not identical: Construction against person preparing document: Election to declare whole sum due: Notice.

1. Where the terms of a contract for the sale of land were ambiguous, the findings of the trial court, based on credible evidence, will not be reversed.
2. A contract ambiguous on its face must be construed in the light of the surrounding facts and circumstances, the situation of the parties, and all of the material evidence in the case.
3. Duplicate contracts prepared by a vendor of land and revised by him to comply with the vendees' wishes, where ambiguous and where the two copies are not identical, will be construed most strongly against the person who prepared them.
4. Where by the contract certain initial payments were to be made in instalments, notice by the vendor of his election to exercise an option to foreclose on account of the failure to pay an instalment renders the unpaid instalments of the initial payment and the remainder of the purchase price due.
5. A vendor or mortgagee, on default in payment of an instalment of a debt, if the security so provides, may on notice declare the whole unpaid amount due.
6. Where the purchaser defaulted in the payment of an instalment of the initial payment for land and was notified by the vendor of his election of the option to foreclose in accordance with the contract of sale, but that he would not foreclose if the instalment was paid within a short time and a substantial amount paid on the principal, failure to make such substantial payment on the principal, as required by the notice, entitled the vendor to foreclose.

APPEAL from a judgment of the circuit court for Oconto county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Action to foreclose land contract.

The plaintiff, the owner of the real estate in question, a short time prior to January 3, 1919, negotiated with the defendant *Frank Stacey* for the sale of the same for the sum of $12,000. *Stacey* had no money with which to make the initial payment, but was the owner of certain personal prop-

erty worth about $2,500, and plaintiff suggested that he was willing to take a chattel mortgage on the personal property to secure payment of the sum of $2,000.

A few days later the plaintiff and defendants met, and the plaintiff brought with him printed forms of land contracts, fully filled out, prepared to carry out the proposed deal. One of the contracts was submitted to the defendant *Frank Stacey*, who read the same, and when he came to that portion of the contract which provides for the payment by the party of the second part of the taxes, he stated, in substance, that there was no use to go any further because he could not pay the interest and taxes and $1,000 a year, and that $1,000 would be all he would be able to pay, and that such sum must cover interest and taxes. The defendant *Frank Stacey* testified that thereupon plaintiff replied that he would pay the interest and taxes.

The contract as originally submitted provided for the payment of the sum of $12,000 as follows: $2,000 at the ensealing and delivery thereof, to be paid by one note for $250 payable in four months; one note for like amount payable in seven months; one for $500 payable in ten months; one for $500 payable in sixteen months; and one for $500 payable in twenty-two months; balance by assuming two mortgages of $8,000, and the balance of $2,000 by a renewal of the chattel mortgage executed to secure the notes given for the down payment. The contract then proceeded to recite that the payments when so made were to apply, when fully completed, as the purchase price of the real estate described in the complaint.

The contract further contained the usual provisions for insurance on the buildings; a tax clause wherein the parties of the second part agreed to pay all taxes, general or special, which had been assessed on the premises since January 1, 1919, and until the purchase money be fully paid.

The contract also contained an election of option to de-

clare the whole amount of the principal and interest due in the event of defendants' default to meet any of the provisions of said contract. And it was further provided in said contract that upon such default and the declaration of such election of option the whole amount of principal and interest would thereupon become due and payable in the same manner as if the whole of said principal sum had been made payable at the time of such default.

It was further provided by said contract that the party of the first part, in the event of the payment of the sum of $12,000 with interest at the times and in the manner specified therein, would, on demand thereafter, cause to be executed and delivered to the party of the second part, etc., a good and sufficient deed in fee simple of the premises in question, free and clear of all legal liens and incumbrances except the taxes therein agreed to be paid by the party of the second part.

Pursuant to the foregoing colloquy between the parties, the plaintiff drew a line through that portion of the contract which provided for the payment of the taxes by the party of the second part, and also drew a line through the words and figures "of $2,000," intended in the original contract to represent the balance to be secured by a renewal of the chattel mortgage executed to secure the notes above referred to.

After the description of the property the following paragraph was inserted:

"It is mutually agreed that the party of the first part pay all taxes and the interest on $8,000 out of the payments made by second party, and the balance of such payments made to be applied on the principal."

All of the notes given for the initial payment were seasonably paid with the exception of the last note for $500 which became due on November 3, 1920.

On November 30, 1920 (the defendants at that time being

in default in the payment of the note becoming due on the 3d day of the same month), the plaintiff caused to be served upon the defendants the following notice, to wit:

"*Mr. Frank Stacey,* Nov. 30, 1920.
"Abrams, Wis.

"Dear Sir: Please take notice that *J. N. Felton,* our client, hereby elects, pursuant to the provisions of the land contract made and entered into with him on the 3d day of January, 1919, to declare due all of the notes given by you for payment of the purchase price, by reason of your failure to pay principal and interest due on November 3, 1919.

"It is not *Mr. Felton's* intention in doing this to commence foreclosure proceedings at all, providing this note is paid within a short time and a substantial amount is paid upon other principal. He merely wishes to take this step in order that he may not lose any rights because of delay in proceeding to action."

This notice was signed by plaintiff's attorneys. Subsequent to the giving of the notice above referred to the defendants paid the last note for $500, but failed to make any further payments of principal, and thereafter the action to foreclose the land contract in question was begun by the plaintiff.

Upon the trial of the action the trial court found, among other things, that the defendants were entitled to a deed of the premises in question free and clear of all incumbrances excepting two mortgages aggregating $8,000, which mortgage indebtedness the defendants shall assume upon delivery to them of a deed to said premises; and that the plaintiff, upon delivery of said deed to the defendants, together with abstract of title showing a good and merchantable title free and clear of all incumbrances excepting the mortgages aggregating $8,000, and free and clear of all tax liens, is entitled to a note executed by the defendants in the sum of $2,000, payable on or before two years, with interest at the rate of six per cent., such note to be secured by a chattel mortgage on the same personal property described in the original chat-

tel mortgage, and that the plaintiff recover the costs of the action.

The court also found that the defendants are entitled to a receipt showing payment of the 1920 taxes and to receipts showing the payment of interest on the real-estate mortgages up to the time of the delivery of the deed. The defendants were given twenty days from April 25, 1921, to make their election to comply with the terms of the contract in question as construed by the court. Such election was thereupon timely made.

Both plaintiff's and defendants' contracts were offered in evidence, but there being a material difference between said contracts, the plaintiff's contract containing material changes not included in the defendants' contract, the trial court adopted defendants' contract, and the correctness of such ruling is not now challenged by plaintiff's counsel.

Judgment was thereupon entered in accordance with such findings of the trial court.

For the appellant there were briefs by *Kittell, Jaseph & Young* of Green Bay, and oral argument by *Lynn D. Jaseph.*

For the respondents there was a brief by *Classon & Whitcomb* of Oconto, and oral argument by *A. J. Whitcomb.*

DOERFLER, J. In construing Exhibit 1 (defendants' contract) it first becomes necessary to consider the objects and purposes the parties had in mind when that portion of the contract was stricken out which obligated the party of the second part to pay the taxes. It is not disputed by the plaintiff that he was to pay the taxes on the property until the maturity of the contract and also the interest on the mortgage indebtedness of $8,000, but it is claimed by him that such payments were to be made out of the payments made by the party of the second part, and that such payments when so made constituted so much additional principal due him, which amount was to be added to the balance of the principal sum to be secured by the renewal of the chattel mortgage.

On the other hand, it is contended by the defendants that this portion of the contract was stricken out pursuant to an agreement between the parties that the taxes and interest referred to were to be paid by the plaintiff and were not to be charged back against the defendants. The testimony also shows that the defendants understood the contract to mean that, after the plaintiff had paid the taxes and the interest on the mortgage indebtedness, the balance of the payments were to be applied by way of reduction of the $2,000 to be secured by a renewal of the chattel mortgage.

In view of the testimony heretofore detailed, the striking out of the provisions for the payment of taxes by the party of the second part is very significant and persuasively indicates that these taxes were to be assumed and paid by the plaintiff and not charged by him to the defendants as so much additional principal. If the plaintiff's contention with respect to the taxes is correct, then the defendants would have to pay the same indirectly, the plaintiff merely acting as defendants' agent in advancing the money for their benefit. Further, the striking out of the word "of" and the sum "$2,000" is indicative of an understanding between the parties that the balance after the payment of the first $2,000 would not be $2,000. Under the theory advanced by the plaintiff the balance would be more than $2,000 and under that advanced by the defendants it would be less than $2,000.

We now come to a very material insertion in the contract after it had been prepared, which is the one immediately following the description of the premises, and which provides:

"It is mutually agreed that the party of the first part pay all taxes and the interest on $8,000 out of the payments made by second party, and the balance of such payments made to be applied on principal."

The provision last referred to, standing alone, would strongly indicate that the balance of $2,000 of principal.

after the payment of the taxes and interest, would have to be applied to whatever principal there was still left and unpaid, exclusive of the amount due upon the mortgage indebtedness of $8,000.

The trial court having construed the agreement to the effect that the plaintiff was to pay the taxes on the property and the interest on the mortgage indebtedness, and that the payment of such taxes and interest was not to be charged up against the defendants, and there being credible evidence to sustain such finding, this court is not prepared to hold that such finding is contrary to the clear preponderance of the evidence. Such finding of the trial court is also in harmony with the idea that the total amount to be paid by the defendants is the sum of $12,000, as is provided for by the contract.

We have not arrived at this conclusion without considerable difficulty. A contract as in the instant case, ambiguous on its face, must be construed in the light of the surrounding facts and circumstances, the situation of the parties, and all of the material evidence in the case. The court has endeavored to place itself as nearly as possible in the situation of the parties at the time of the execution of the contract, and has considered the important fact that this contract was prepared by the plaintiff or at his instigation, and was revised by him after the objections had been interposed as heretofore detailed by the defendants. It was then incumbent upon the plaintiff to submit such an unambiguous contract for final execution as would substantially comply with the intentions of the parties in order that their wishes might be properly carried out. This the plaintiff has failed to do. On the contrary, he not only left with the defendants a contract ambiguous on its face, but has submitted his own contract, which contained material changes, differing substantially from the contract delivered to the defendants. Such a contract must be construed most strongly against the party

preparing it or employing the words concerning which doubt arises. 13 Corp. Jur. p. 545, § 516; 8 Elliott, Contracts, § 1528.

"As a general rule the language of a contract, in case of ambiguity, should be interpreted in the sense that the promisor knew, or had reason to know, that the promisee understood it." 13 Corp. Jur. p. 523, § 484.

It is to be regretted that the parties, in the drafting and revision of a contract involving a large sum of money and substantially making disposition of a large part if not all of their earthly possessions, did not see fit to secure the advice and assistance of legal counsel. The drafting and revising of a land contract involves clearly a matter within the field of the practice of the law. In fact, the drafting of such a document for pay, by one not licensed to practice the profession, constitutes a serious infraction upon the provisions of the statutes. Had these parties seen fit to expend a small sum of money to obtain legal assistance, the deplorable condition presented by the contract in question, in all reasonable probability, would not have arisen. The efforts of laymen in this regard frequently result not only in a great economic waste, but in considerable ill-feeling, trouble, and worry on the part of litigants.

Under the views heretofore expressed, we hold that the contract as above detailed was properly construed by the trial court.

It is contended by plaintiff's counsel that the service of the notice aforesaid, after defendants' default, constituted a sufficient declaration of notice of election of option as provided for by the contract, and that pursuant to such service the total amount of unpaid principal, exclusive of the mortgage indebtedness, immediately thereafter became due and payable.

On the part of the defendants it is claimed that such notice merely declares due the notes given for the initial payment. Such notice also contains the provision:

"It is not *Mr. Felton's* intention in doing this to commence

a foreclosure proceeding at all, providing this note is paid within a short time, *and a substantial amount is paid upon the principal.*"

The provision of the notice last referred to is strongly indicative that what was intended by the plaintiff was a declaration of election of option, not only to declare due the last instalment of the first series of notes, but also the entire principal, exclusive of the two mortgages. That it was so understood by the defendants is clearly shown by the testimony of *Frank Stacey.*

With reference to a contract like the one in question, it is held in *Julien v. Model B., L. & I. Asso.* 116 Wis. 79, 92 N. W. 561, that:

"This court stands alone, or nearly so, in holding that notice of election should be given the debtor as a condition of treating the contract as fully matured; but its decision in that regard is not based upon a construction of the contract. 2 Pingrey, Mortg. § 1539; Jones, Mortg. § 1182*a*, and cases cited." The rule requiring the service of such a notice is not based upon judicial or other authority, but was declared "as a rule of equity, to be applied where a person seeks its jurisdiction to enforce his mortgage to the full extent, under an option so to do, by reason of some default in the terms thereof."

In *Basse v. Gallegger,* 7 Wis. 442, it is held:

"It seems to us but just and proper to require the mortgagee, in cases like the present, to exercise his election, and give notice thereof to the mortgagor, before bringing suit."

In view of the fact that the notice above set forth was duly served, and the message it conveyed to the defendants, and the understanding they derived therefrom, we are of the opinion that the equitable rule above set forth has been fairly complied with.

The right of a vendor in a land contract, and of a mortgagor under a mortgage containing provisions similar to the one contained in the contract in question, to declare the whole amount due upon default, is too well established by

authority to require any further comment. See 27 Cyc. 152, 153; 2 Jones, Mortgages, §§ 1184–1186.

Under the authorities cited, in case of default the whole amount of principal and interest becomes due upon the declaration of election of option and the service of proper notice, as much so as though the instrument itself in express terms provided for the amounts becoming due at that time. The last of the first series of notes having been paid after the service of the notice of election of option, and no substantial portion of the remaining principal having been paid, in accordance with the requirements of such notice, the plaintiff is clearly entitled to a judgment of foreclosure of the land contract in question. In accordance with what has been heretofore said, there was due and unpaid on the 3d day of November, 1920, in addition to the last instalment due upon the first series of notes, the sum of $2,000 of principal.

The plaintiff, therefore, is entitled to the usual and ordinary judgment of foreclosure of land contract for the amount due as indicated herein, which amount became due on November 3, 1920, and such judgment must also provide that unless the defendants, within such time as the trial court shall find reasonable and just under all the facts and circumstances in the case, shall pay to the plaintiff the sum of $2,000 and interest thereon from November 3, 1920, at the rate of six per cent. per annum, together with the costs and disbursements of the action, the defendants and all persons claiming by, through, or under them, or any or either of them, shall be foreclosed of all right, title, and interest in and to the premises and of all right to redeem the same. It follows as a matter of course that if the defendants comply with the provisions of such decree they are entitled to a proper deed of the premises, free and clear of all incumbrances and free and clear of all taxes assessed against and payable on said premises prior to November 3, 1920, and subject only to the mortgage indebtedness of $8,000, with interest thereon from November 3, 1920.

By the Court.—Judgment reversed, with $25 costs, with directions to enter judgment in the lower court in accordance with this opinion.

BAHLERT, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

November 15—December 13, 1921.

Railroads: Accident at grade crossing: Failure to ring bell: Care required of traveler: Failure to look when within or near danger zone: Excuse.

1. It is the duty of one approaching a railroad track to look and listen when approaching the zone of danger and at the last practicable or reasonable opportunity; and it was not sufficient for one driving an automobile about twelve miles an hour to look when from 600 to 700 feet from the track, as he was not then within or near the danger zone.
2. Where an automobile driver, traveling a road which intersected a railroad track at an angle of 120 degrees, was familiar with the crossing, had normal hearing and sight, and had an unobstructed view for the last 100 feet, he was guilty of more than a slight want of ordinary care in failing to look for trains until he was only twelve or fifteen feet from the track and unable to stop before reaching it. *Gordon v. Ill. Cent. R. Co.* 168 Wis. 244, distinguished.
3. No bell having been rung, a slight want of ordinary care on plaintiff's part does not defeat recovery, and the strict rule of ordinary care is correspondingly relaxed; but such relaxation does not abrogate the duty to look and listen for trains. Failure to look and listen within the zone where the duty exists, without sufficient excuse, constitutes more than a slight want of ordinary care.
4. To abrogate the rule as to the duty to look and listen at railroad crossings, the excuse for diversion of attention must be substantial.

APPEAL from a judgment of the circuit court for Marinette county: W. B. QUINLAN, Circuit Judge. *Reversed.*

Action to recover damages sustained by plaintiff in a collision with defendant's train. Hall avenue, Marinette, runs in an easterly and westerly direction and is intersected by

the track of the *Chicago, Milwaukee & St. Paul Railway Company,* which runs from northwest to southeast, forming an angle of 120 degrees on the northeast side of the highway and an angle of 60 degrees on the southeast. On September 4, 1917, at about 3:30 p. m., defendant's train, consisting of an engine and fourteen cars, approached the crossing from the northwest at a rate of speed of from twelve to fifteen miles an hour. The plaintiff, *Hugh Bahlert,* approached the crossing from the east at a rate of speed of about twelve miles an hour. When about 100 feet east of the crossing he passed another car which turned out and slowed up for him and then came to a stop. After passing the car *Bahlert* continued toward the track, and when about twelve or fifteen feet from it he first saw the train. He set his brake and turned his wheel to the right, but ran onto the track and was struck by the train.

The jury found (1) that the engine bell was not rung continuously from the time the train was within twenty rods of Hall avenue crossing until the time of collision; (2) that such failure to ring said engine bell was a proximate cause of the injuries to plaintiff; (3) that defendant's train was moving at a speed faster than twelve miles an hour while approaching within twenty rods of Hall avenue crossing; (4) that such fact was a proximate cause of the injuries to plaintiff; (5) that plaintiff in driving his automobile toward and upon the crossing was not guilty of more than a slight want of ordinary care proximately contributing to his injuries; and (6) damages in the sum of $10,000.

The trial court gave to defendant the option to accept a judgment against it for $7,000 and costs, or, in case it was not accepted, it gave plaintiff the option to accept judgment for $6,000 and costs or a new trial. Defendant elected not to exercise its option and plaintiff elected to accept judgment for $6,000. From a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *H. J. Killilea* and

Rodger M. Trump, both of Milwaukee, and *Martineau & Martineau* of Marinette, and oral argument by *Mr. Trump.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *Gerald F. Clifford,* all of Green Bay.

VINJE, J. The vital question raised by the appeal is whether plaintiff was guilty of more than a slight want of ordinary care in driving his automobile so close to the track without looking for a train. The testimony is that he looked when from 600 to 700 feet from the track and that he drove at a rate of speed of about twelve miles per hour, and did not look again till within twelve or fifteen feet of the track, when it was too late to avoid the collision. The first observation was obviously too early to be relied upon alone, especially in view of his slow rate of speed. He was then not within or near the zone of danger and would not be for a considerable time. The duty to look and listen is when approaching the zone of danger and at the last practicable or reasonable opportunity. So his first observation cannot be relied upon to show compliance with his duty to look and listen. His second and last observation was too late. He was familiar with the crossing; had normal hearing and sight, and within the last one hundred feet he had an unobstructed view of the track and train for a long distance. There was evidence that some trees obstructed his view, but the nearest tree to the track was twenty feet from the right of way and the road made an angle of 120 degrees with the track on the right-hand side—on which side plaintiff sat, his car having a right-hand drive,—so that in order to look for the train he could look almost straight ahead, and the tree mentioned did not obstruct his view of the train at all after he came near the zone of danger when it became his duty to look.

There is also claim made that his view was obstructed and his attention diverted by a Ford car with top down that he

passed about one hundred feet from the track. He estimated the distance at seventy-five feet, but said it was near the center of Van Cleve avenue. Measurements showed the distance to be 105 feet. He said the Ford car slowed up and stopped at the place indicated by him. If so, and there is nothing to dispute it, he had nothing to interfere with his looking for a train after he passed the Ford car a distance of from ninety to one hundred feet. The car back of him could not divert his attention. Indeed, it would seem that its stopping near a railroad crossing would constitute a warning to him to stop also, at least to look for a train. And had he looked during the first sixty feet after passing the car he could have seen the train in time to avoid it.

Plaintiff relies upon the case of *Gordon v. Ill. Cent. R. Co.* 168 Wis. 244, 169 N. W. 570. But in that case there were obstructions to the view of the train for a long distance back from the track, and it was only during the last thirty feet that the traveler had an unobstructed view of the train, and it was said that there could be no assumption that the deceased neither looked nor listened for the train. Here we have plaintiff's own testimony that he neither looked nor listened except at two points, one too early and the other too late.

It is true that in cases of this kind where a slight want of ordinary care on plaintiff's part does not defeat recovery, the strict rule of ordinary care is correspondingly relaxed as stated in the *Gordon Case,* but that relaxation does not abrogate the duty to look and listen for a train at a railroad crossing. And when it appears, as here, that there is a failure to look and listen within the zone where the duty exists, such failure, unless a sufficient excuse therefor is shown, constitutes more than a slight want of ordinary care. *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148; *Puhr v. C. & N. W. R. Co.* 171 Wis. 154, 176 N. W. 767.

We reach the conclusion that from the undisputed evidence plaintiff was guilty of more than a slight want of ordinary care and hence cannot recover damages. In arriving

at such conclusion we are not unmindful of the weight that should be given a verdict approved by the trial court. Were the evidence as to the main facts conflicting, the jury's finding would ordinarily be conclusive. But here there is no conflict in the evidence. The only question is what conclusion should be drawn from it as to the degree of contributory negligence. To allow the verdict to stand would be to permit the most flimsy excuse for diversion of attention to abrogate the rule as to duty to look and listen. Such an excuse must be substantial. *White v. M., St. P. & S. S. M. R. Co.* 147 Wis. 141, 133 N. W. 148. As before suggested, the alleged excuse, namely, the stopping of the other car before it reached the railroad crossing, was more in the nature of a warning than an excuse.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action upon the merits.

LIBMAN and another, Appellants, vs. FOX-PIONEER SCRAP IRON COMPANY, Respondent.

November 16—December 13, 1921.

Sales: Statute of frauds: Delivery of goods: Failure to conform to contract requirements: Misdirected shipments: Drafts in excessive amounts: Passing of title: Remedies of buyer: Customs: Evidence: Sufficiency.

1. Where plaintiffs claimed both an oral and a written contract with defendant containing substantially the same terms and that they had shipped goods pursuant to the oral contract, they had the burden of proving that the goods delivered to and accepted by defendant were delivered under the oral contract.
2. Delivery of goods alone is not sufficient to take an oral contract out of the statute of frauds, but it must be made under and pursuant to the contract.
3. In an action for breach of a contract to purchase scrap iron, evidence that the goods tendered for delivery contained many articles not covered by the contract, that some of the car-

loads shipped were misdirected, and that the drafts attached to bills of lading for other cars were for more than the contract price, is *held* to sustain the action of the trial court in setting aside the findings of the referee of tender under the contract.

4. Under sub. 2, sec. 1684*t*—20, Stats., providing that if the property would have passed to the buyer on shipment except for the form of the bill of lading the seller's property in the goods shall be deemed to be only to secure the performance by the buyer of his obligation, the beneficial title to the goods does not pass on shipment where they did not conform to the contract of sale or were misdirected.
5. Evidence that previous carloads of scrap iron containing boilers and sheet iron had been accepted, but only after the buyer had procured an adjustment for the goods not covered by the contract, does not sustain a finding by the referee that there was a custom for such goods to be included in shipments of scrap iron and to be paid for at the market price.
6. Under sub. 3, sec. 1684*t*—44, Stats., providing that where the seller delivers the goods sold mixed with goods of a different description the buyer may accept those in accordance with the contract and reject the rest, or may reject the whole, the buyer of scrap iron could reject the whole of shipments containing boilers and sheet iron, or which were misdirected so as to impose demurrage charges, or for which drafts attached to the bill of lading were drawn for amounts exceeding the contract price.

APPEAL from a judgment of the circuit court for Racine county: GEORGE THOMPSON, Judge. *Affirmed.*

Contract for sale of goods. The following contract was entered into at Racine, Wisconsin, between the parties:

"Racine, Wis., June 13, 1917.

"Libman Brothers of Wausau, Wisconsin, agree to sell and *Fox-Pioneer Scrap Iron Company* agrees to buy—

"15 carloads of country mixed scrap iron to consist of all the small blacksmith shop scrap, cast iron, and to contain about two tons of stove plate to the car, otherwise free from boilers and sheet iron, at a price of $22 per net ton f. o. b. cars Racine, Wisconsin;

"Western Railway Weighing Association weights to govern settlement;

"Sight draft in full, less freight, attached to bill of lading.

"Delivery to be made within forty days.
"Shipment to be made to Racine, Wis.
"FOX-PIONEER SCRAP IRON COMPANY,
"Per M. L. Fox.
"Accepted: Libman Bros.,
"By M. Libman."

Plaintiffs claim performance on their part and allege that the defendant refused to accept fourteen cars tendered for delivery under the contract, resulting in damages to the plaintiffs in the sum of $8,000. The defendant admitted the making of the contract, alleged that defendant accepted and paid for six carloads of scrap iron shipped under the contract, further alleged, by way of counterclaim, that plaintiffs violated the contract on their part by shipping excessive quantities of stove plate, sheet iron, and other material expressly excluded by the terms of the contract, by drawing drafts for amounts in excess of the contract price, by misdirecting the cars so that demurrage accrued on their arrival, and that, by reason of being compelled to pay the drafts in order to obtain possession of the cars, the defendant had overpaid the plaintiffs the sum of $512.63, for which amount the defendant counterclaimed. The case was referred to a referee to hear, try, and determine, and trial before the referee was begun July 5, 1918. The referee filed his report on April 24, 1920, finding in favor of the plaintiffs, and assessing their damages at the sum of $3,041.76, against which he allowed a setoff in the sum of $343.26, which he found due the defendant on its counterclaim, and awarded judgment in favor of the plaintiffs accordingly. The defendant duly excepted to the findings of the referee and moved for findings in its behalf, and upon hearing before the court the referee's report was, in the main, set aside, except as to the amount found due the defendant on its counterclaim, as to which the report was confirmed, and from judgment entered in favor of the defendant the plaintiffs appeal.

For the appellants there was a brief by *Fawcett & Dutcher*

and *Rubin, Wurster & Rouiller,* attorneys, and *W. B. Rubin* and *C. F. Rouiller,* of counsel, all of Milwaukee, and oral argument by *Mr. Rouiller* and *Mr. George C. Dutcher.*

For the respondent there was a brief by *Simmons & Walker* of Racine, and oral argument by *John B. Simmons.*

ROSENBERRY, J. Upon the trial it was contended by the plaintiffs that prior to the making of the written contract there was an oral contract for five cars of scrap iron between the parties which, in terms, was identical with the written contract of June 13, 1917. Much of the controversy turns on the question of whether or not there was such an oral contract. The trial court, reviewing the findings of the referee, did not set aside the finding to that effect. In the disposition which we make of this case we regard it as immaterial whether or not there was such an oral contract. In addition to setting aside the findings of the referee the trial court found affirmatively that the plaintiffs breached the written contract by failing to ship to the defendant the material called for by the contract; also by failing to bill cars in such manner and to send drafts and bills of lading in such manner and form and in proper time to allow prompt delivery of cars and avoid the accruing of demurrage thereon; also by drawing drafts in excess of the purchase price of the contents of the cars, less deduction for freight, and by refusing and neglecting to pay defendant such amounts as it had been obliged to pay by reason of overdrafts. These findings, and each of them, are amply sustained by the evidence. It is undisputed that the plaintiffs never specified that any of the cars shipped were to be applied upon the oral contract. No mention was ever made of it by the plaintiffs during the entire period of attempted delivery. The burden was on the plaintiffs to show acceptance under the oral contract of a part of the goods at least, otherwise the contract was void under sec. 2308, Stats. (statute of frauds). There is not a scintilla of evidence that tends

to show such delivery. The plaintiffs testified that they did not attempt to make such a delivery. There is a claim to that effect, but no evidence to sustain it. Delivery of goods alone is not sufficient to take the contract out of the statute. The delivery must be under and pursuant to the contract. *Matthiessen v. McMahon's Adm'r,* 38 N. J. Law, 536; *Atherton v. Newhall,* 123 Mass. 141. See 25 Ruling Case Law, p. 624, § 242.

It is equally certain that the defendant applied such shipments as were accepted to the written contract, and constant reference was made to the contract of June 13th, and settlements were made in accordance with its terms. While much of the testimony might apply to either contract, due to the fact that the claimed oral contract was identical in terms with the written contract, there was enough to show that the written contract was the one under consideration by the parties. References in the correspondence establish that fact without dispute.

Considerable argument is made to the effect that the trial court did not give sufficient effect to the rule that the findings of a referee are to be regarded by the trial court on review as having the same dignity as findings of the circuit court when such findings are challenged here. *Ott v. Boring,* 139 Wis. 403, 121 N. W. 126. We are of the opinion that under the evidence in this case the trial court correctly set aside the findings of the referee within that rule. The undisputed testimony shows that no car complying with the terms of the contract as to the quality of material was properly tendered. The cars either contained material not covered by the contract, or were accompanied by drafts for an amount in excess of the selling price, or were misdirected. In a number of cases where the tender was accepted and delivery made, the plaintiffs were required to make adjustments, agree to pay overdrafts and accept deductions, in order to procure an acceptance of the goods tendered. After repeated warnings they still continued to ship non-contract

material and to attach the bill of lading to drafts for amounts in excess of the selling price and improperly consigned shipments. Of the fourteen cars remaining undelivered thirteen were sold to local dealers in Racine and one returned to Wausau. The thirteen cars were found to contain eight boilers from six to eight feet long, not less than thirty-six inches in diameter, 107,200 pounds of stove plate, a large quantity of sheet iron, and other material which would have to be cut up at considerable expense. The car returned to Wausau, according to the plaintiff's testimony, consisted of about eighteen or nineteen tons of sheet iron, about ten tons of plow points, and some boiler plates. The referee proceeded upon a mistake of law as to what constitutes a valid tender of goods and held the defendant liable as if there had been a tender of goods under the contract which the defendant was bound to accept.

It is claimed on behalf of the plaintiffs that title to the goods passed to the defendant under the provisions of sub. 2, sec. 1684*t*—20, Stats.

"Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

By attaching the bill of lading to a sight draft indorsed to a third party, in this case the Citizens Bank of Wausau, title to the goods passed to the bank and could not vest in the defendant until the draft was paid. *American Thresherman v. Citizens Bank,* 154 Wis. 366, 141 N. W. 210. If the title of the bank be regarded as qualified and to be held only as security for payment of the purchase price, the defendant did not become the owner of the beneficial title to the goods, where the goods shipped were not those ordered or where the consignment was misdirected. In order to make the rule of

transfer of beneficial title operative, the seller must act in conformity with the terms of the contract. Williston, Sales, § 278, and cases cited. In this case the goods contracted for were shipped mixed with goods not covered by the contract, which gave the defendant the right to reject them. Some of the shipments were misdirected and in other cases the draft called for payment of an amount in excess of the contract price of the goods. The seller failed to conform to the contract and the beneficial ownership of the goods did not pass to the buyer.

One of the principal questions in this case is whether or not the plaintiffs tendered goods of the kind and quality specified in the contract of June 13th, and upon that point the referee made no findings whatever. The findings of the referee attempt to meet that situation by a finding to the effect that it had been customary in the dealings between the parties to include boilers and other material than country mixed iron in the shipments of the plaintiffs and that the defendant had received the same and allowed the market price therefor. We find no evidence in the record to sustain such a finding. The fact that on the six cars accepted adjustments were made before delivery does not tend to establish a custom, but, quite the contrary, it shows there was no custom. Had there been such a custom as claimed, there would have been no need of prior adjustment in each case before acceptance of shipments.

By the provisions of sub. 3, sec. 1684*t*—44, Stats., it is provided:

"Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole."

Eleven of the fourteen cars contained material not in accordance with the contract, which the defendant was justified in rejecting. See 2 Mechem, Sales, §§ 1203, 1208; *Pope*

v. Allis, 115 U. S. 363, 6 Sup. Ct. 69; *Grenawalt v. Roe,* 136 Wis. 501, 117 N. W. 1017. The remaining cars were either misdirected or accompanied by drafts in excess of the amount of the selling price, which the defendant would have been required to pay in order to obtain possession of the cars. This it could not be required to do. As a condition of having the goods delivered to it by the railway company it was required to pay no more than the contract price. The drawing of drafts by the plaintiffs in excess of the contract price appears not to have been a mere mistake, but was a practice followed by them almost uniformly, and, as the trial court found, they breached their contract by failing to repay to the defendant, in cases where cars were accepted, the amount of the drafts in excess of the contract price.

Whether or not there was an oral contract becomes immaterial also for the reason that goods covered by the contract were not properly tendered by the plaintiffs to the defendant either under the written or oral contract, and it was therefore not bound to accept and pay for them.

We call attention to the fact that the printed case here does not comply with Rule 6. It contains matter arranged argumentatively, is not an abridgment of the record in narrative form, and not properly arranged. Cases so prepared add materially to the burden of work here and make constant reference to a long record necessary. The correct practice in preparing a case is plain and simple and should be followed.

By the Court.—Judgment affirmed.

WESTERN PATTERN & MANUFACTURING COMPANY, Respondent, vs. AMERICAN METAL SHOE COMPANY, Appellant.

November 16—December 13, 1921.

Judgment: Vacation: Lack of service of process: Meritorious defense need not be shown: Service on resigned officer of corporation.

1. A judgment rendered in the absence of service of process on the defendant should be vacated, set aside, and expunged from the record; and a motion made for that purpose need not be coupled with a showing that the defendant had a meritorious defense to the cause of action set forth in the complaint.
2. The resignation of an officer of a private corporation terminates the office and a vacancy is at once created; and service of process on such resigned officer is not service on the corporation, notwithstanding a by-law providing that the directors of said corporation shall hold office until their successors are duly elected.

APPEAL from an order of the municipal court of Racine county: WALTER C. PALMER, Acting Municipal Judge. *Reversed.*

The appeal is from an order denying a motion to vacate and set aside a judgment rendered therein in favor of plaintiff and against the defendant.

Eugene Wright Lawton of Racine, for the appellant.

For the respondent there was a brief by *Gittings & Moyle* of Racine, and oral argument by *O. R. Moyle.*

OWEN, J. Plaintiff and defendant are Wisconsin corporations. Service of the summons in this action upon the defendant was attempted by delivering to and leaving a copy thereof with one M. Elholm on the 20th day of May, 1920, who at the time of such delivery was supposed to be the secretary of the defendant corporation. The defendant made default, and judgment was rendered in favor of the plaintiff upon the cause of action set forth in its complaint.

Thereafter the defendant procured an order requiring plaintiff to show cause why such judgment should not be set aside for the reason that the court had never obtained jurisdiction of the defendant, which said order to show cause was based upon an affidavit of the president of the defendant corporation to the effect that at the time of such attempted service the said M. Elholm was not the secretary of the said defendant corporation nor was he any other officer thereof upon whom service of summons upon said corporation might have been made; that he was secretary of said defendant corporation prior to the 31st day of October, 1919, but on said latter date he resigned said office, in writing, and that he likewise on said date resigned his office as a member of the board of directors of said company. In response to such order to show cause there was filed an affidavit, sworn to by Miller Patterson, president of plaintiff corporation, in which he deposed that he was informed and verily believed that one M. Elholm was secretary and director of the defendant prior to the 31st day of October, 1919; that he had no knowledge of his resigning his office; and that, as he is informed and believes, no successor was either elected or qualified in his place, either as director or secretary.

There is no denial of the fact that Elholm did resign as secretary of the company on the 31st day of October, 1919, and we regard it as a verity in the case that at the time of the attempted service, May 12, 1920, he was not an officer of the corporation unless, as contended in this court by respondent, he continued in office until his successor was elected and qualified. Patterson deposes that as "he is informed and verily believes the by-laws of the *American Metal Shoe Company* provide that the directors of said corporation shall hold office until their successors are duly elected." It has been held by this court that such a provision in the by-law of a corporation does not prevent the existence of a vacancy in an office of a private corporation upon the filing of a resignation by one who is then an incumbent of such office. The resignation terminates the office and a vacancy is at once

created. *Will of McNaughton,* 138 Wis. 179, 208, 118 N. W. 997, 120 N. W. 288. It accordingly follows that no summons was ever served upon the defendant and that the trial court never acquired jurisdiction to render judgment in the action.

It is contended, however, that the judgment rendered should not be vacated or set aside because the motion to that end was not coupled with a showing that the defendant had a meritorious defense to the cause of action set forth in the complaint. While the affidavit filed in support of the order to show cause avers "that the said *American Metal Shoe Company* has a good and sufficient defense to the cause of action as claimed by the plaintiff in the above entitled cause," it cannot be said to disclose a meritorious defense under the requirements of our practice.

There seems to be respectable authority in support of the proposition that even though a judgment be rendered against a defendant in the absence of any service upon him, yet a court of equity will not set such judgment aside in the absence of a showing that the defendant has a defense upon the merits to the cause of action. In 15 Ruling Case Law, p. 737, it is stated that a large preponderance of the authorities hold that, notwithstanding an alleged want of service, or notice, a court of equity will not interfere to set aside a judgment until it appears that the result upon a subsequent trial will be other than that already reached; or in other words, that there was a meritorious defense to the action. A note to the case of *Brandt v. Little* (47 Wash. 194, 91 Pac. 765) 14 L. R. A. N. S. 213, collates a number of decisions announcing such doctrine. While this rule has been applied in this state in actions brought to set aside judgments rendered by justices of the peace where jurisdiction was lost by reason of irregularities (*Stokes v. Knarr,* 11 Wis. 389; *Thomas v. West,* 59 Wis. 103, 17 N. W. 684), it has never been applied in cases where a judgment was rendered in the absence of any service upon the defendant.

The idea that a court will not relieve against a judgment

rendered in proceedings of which the defendant had no notice is obnoxious to our notions of fundamental justice, even though he have no defense upon the merits. The constitution of the United States provides that property shall not be taken without due process of law, and to seize a man's property by virtue of a judgment rendered by a court which never acquired any jurisdiction of the judgment debtor, in an action of which he had no notice and was never accorded an opportunity to be heard in defense thereof, would seem to be nothing less than a taking of property without due process of law. It may be that he had no defense to the action, but the fundamental law of the land secures to him the right to be heard in his defense; and as this right was deemed sufficiently sacred to be protected by constitutional provision, any action of a court in violation of such right is without vestige or shadow of authority, and its pronouncement under such circumstances is not a judicial pronouncement in any sense of the word. However, it is not necessary for us to discuss at length these fundamental principles which we think demonstrate the unsoundness of the doctrine that a court of equity will not set aside a judgment obtained under such circumstances, as this court has spoken definitely and often upon the very question here presented. It is firmly established in this jurisdiction that where a motion is made in the same case to set aside a judgment void for want of service upon the defendant, no showing in the nature of a meritorious defense is necessary. The judgment is held absolutely void and the court should expunge it from the record whenever its attention is called to the fact that jurisdiction of the defendant was not acquired by reason of a lack of service of process upon him. *Carr v. Commercial Bank,* 16 Wis. 50; *Wendel v. Durbin,* 26 Wis. 390; *Godfrey v. Wright,* 151 Wis. 372, 139 N. W. 193. A perusal of those cases, with *Rape v. Heaton,* 9 Wis. 328, and *Pollard v. Wegener,* 13 Wis. 569, fully reveals the attitude of this court upon the question of enforcing a judgment rendered in

the absence of service of process. Such a judgment has always been regarded as a mere nullity. It is not a judgment. It is the mere image of a judgment. Its enforcement constitutes a taking of property without due process of law, and will not be tolerated. It was the duty of the trial court to expunge the judgment from the record.

By the Court.—Order appealed from reversed, and cause remanded with directions to vacate the judgment.

JELENIEWSKI, Appellant, vs. ECK and another, Respondents.

November 16—December 13, 1921.

Fraud: Representations as to future event: Appeal: Amendment from tort to contract: Disposition of case.

1. Statements or representations as to future or contingent events, or as to expectations or probabilities, or as to what will be or is intended to be done in the future, do not constitute actionable fraud.
2. Where plaintiff brought an action of tort because of the false representations of his lessor that a building would be ready for occupancy at a certain date, and after verdict in his favor the trial court directed judgment in favor of the landlord on the theory that the representations were expressions of opinion, the judgment will not be affirmed, but, the plaintiff having proved every element of a valid contract, the case will, under sec. 2836*b*, Stats., be remanded to permit him to amend his complaint so as to change the action to one on contract and for further proceedings in the same action.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

The appeal is from a judgment dismissing plaintiff's complaint and awarding judgment in favor of defendants notwithstanding the verdict.

The complaint alleged that defendants, in order to induce plaintiff to become their tenant in a store building, fraudulently represented that the building would be ready and fit

for occupancy on May 1, 1920; that defendants knew that the building had been condemned and would not then be fit for occupancy; that the representations were made for the purpose of deceiving plaintiff, and that he was in fact deceived by them; and that, relying on such representations, he disposed of his farm and personal property, entered into a lease, purchased suitable fixtures for conducting a pool-room in the store in question, and by reason of the building not being fit for occupancy was forced to move out and sell his fixtures at a great loss.

It is undisputed that the construction of the building was not in accordance with certain ordinances of the city of Kenosha and that by reason thereof the city would allow neither lights nor water to be connected. Plaintiff moved in about May 1, 1920, occupied and paid rental for three rooms as living quarters, but paid no rental for the store proper. He remained about two months, finally leaving because of the reasons above stated.

The testimony was undisputed that the defendants agreed to have the building ready by May 1, 1920. In a special verdict the jury found for the plaintiff on all the allegations in the complaint and fixed the amount of damages at $600.50. Plaintiff's motion for judgment on the verdict was denied and defendants' motion for judgment notwithstanding the verdict was granted.

For the appellant the cause was submitted on the brief of *Calvin Stewart* of Kenosha.

For the respondents there was a brief by *Cavanagh & Mittelstaed* of Kenosha, and oral argument by *G. A. Mittelstaed.*

JONES, J. Evidently with some reluctance the trial court entered judgment for defendants notwithstanding the verdict of the jury, acting on the theory that the representations relied on were mere expressions of opinion or intent to do something in the future, and not representations of an exist-

ing fact or a past event. As the trial court said in the opinion:

"There is no dispute that the general rule is that statements or representations as to future or contingent events or as to expectations or probabilities, or as to what will be or is intended to be done in the future, do not constitute actionable fraud." *Patterson v. Wright,* 64 Wis. 289, 25 N. W. 10; *Sheldon v. Davidson,* 85 Wis. 138, 55 N. W. 161; *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231; 12 Ruling Case Law (Fraud and Deceit) §§ 19–21. See note in 10 L. R. A. N. S. 640.

In their special verdict the jury found that defendants represented that the building would be ready for occupancy May 1, 1920; that the false representations were made as a statement of existing fact; that they were untrue and were recklessly made and with intent to deceive and to induce plaintiff to act upon them; that he did rely upon them and was induced to enter into a contract for the leasing of the building, and to purchase a stock of goods for his business and to sell his personal property on the farm; and that when the representations were made defendants did not intend to comply with the building ordinances so that an occupancy permit would be issued by May 1, 1920.

Although it is elementary that mere broken promises do not constitute actionable fraud, it is not so clear that an action for fraud may not be predicated upon a false statement of present intent, which is material, made with intent to deceive, and relied on by the other party. There is much authority for the view that a condition of mind is as much a fact as a condition of the body, although more difficult to prove; and that therefore a misstatement of a man's mind is a misstatement of fact. In the present case the promise was coupled by the proof with present intent to break it. The cases supporting the contention that such representations are actionable will be found collected in 12 Ruling Case Law (Fraud and Deceit) § 28. There is also authority for

the contrary view in 12 Ruling Case Law, p. 262, § 29, and the case of *Tufts v. Weinfeld,* 88 Wis. 647, 60 N. W. 992, tends to support the view of the trial court, although the subject was not discussed in the opinion of the court.

But we have come to the conclusion that the present case should be decided on another ground. Although the complaint sounded in tort and alleged the fraud of defendants, the undisputed testimony showed that defendants agreed to have the building ready for occupancy at a given date; that the plaintiff relied and acted on the agreement and carried out his part of the contract. There was every element essential to a valid contract. If the defendants acted fraudulently, as the jury found, that did not vitiate the contract as to the party damaged. The undisputed testimony showed, as the jury found, that plaintiff sustained damage in the sum of $600.50.

Under the old procedure there was a gulf between actions for fraud and those on contract which could not be bridged. Under that procedure if a plaintiff failed to prove the fraud alleged, although there might be clear proof of a contract, he would be turned out of court. He could curse the law's delays, pay the costs, and, if not discouraged, could frame new pleadings, sue on contract, rally his witnesses again, enter the court through another door, and, if all went well, recover judgment. We are very glad that under existing statutes we can shorten the plaintiff's road to justice, and but for the provisions of sec. 2836*b*, Stats., we should direct that judgment be entered for plaintiff pursuant to sec. 2405*m*, Stats. *Knudson v. George,* 157 Wis. 520, 147 N. W. 1003.

Although the record as it comes to us shows that the contract was made, the case was tried on the theory of fraud, and it may be claimed by defendants that they have the right to introduce further proof that they did not enter into any agreement to have the building ready for occupancy as alleged by the plaintiff. When the cause of action is changed

from tort to one on contract, the statute, sec. 2836*b*, seems to require that the complaint be amended and for further proceedings in the same action. *Jilek v. Zahl*, 162 Wis. 157, 155 N. W. 909; *Cronin v. Janesville T. Co.* 163 Wis. 436, 158 N. W. 254.

Therefore the plaintiff should be required to amend the complaint and the parties should be allowed to give such further proof as may then be relevant.

By the Court.—Judgment reversed, and action remanded for further proceedings in accordance with this opinion.

HAYES MOTOR TRUCK WHEEL COMPANY, Appellant, vs. WOLFF and others, imp., Respondents.

November 17—December 13, 1921.

Partnership: Persons operating under corporate name: Liability if not incorporated: Winding up partnership: Participation by creditors: Actions against individual partners.

1. Persons doing business under a corporate name pursuant to a recorded trust agreement relieving them from liability, but without being incorporated, and not holding themselves out as doing business under such agreement, were individually liable as partners for the debts of the concern contracted while they were partners therein.
2. A receiver appointed to settle the affairs of a partnership upon the application of one of the partners does not represent creditors, and they may file their claims, receive a dividend, and later, in separate actions, have recourse to the assets of individual partners.

APPEAL from a judgment of the circuit court for Racine county: W. B. QUINLAN, Judge. *Reversed.*

Action to recover the purchase price of a certain number of truck wheels sold to the defendants, who it is alleged were doing business as copartners under the name of the Ton-A-Ford Truck Company. The answers denied that defendants were copartners and alleged they were operat-

ing under a certain trust agreement duly recorded in the office of the register of deeds of Racine county, under which agreement they were relieved from personal liability.

The trial court found that defendants were copartners; that they were not operating under the trust agreement, and that plaintiff had no notice of the same, and that all the appealing defendants were holders of certificates of stock in the company at the time the indebtedness was incurred. Plaintiff was a foreign corporation and the sale was made through correspondence. At the bottom of the second letter sent plaintiff, in small print, was this clause:

"All statements or agreements contained in this letter are contingent on strikes, accidents, fires, or any other causes beyond our control, and all contracts are subject to approval by the signature of a duly authorized officer of this company, and the officers or shareholders assume no personal liability."

The trial court also found:

"That the said Ton-A-Ford Truck Company became largely indebted to various parties; that the defendant Harry J. Sanders, on the 6th day of September, 1917, instituted proceedings in the municipal court of Racine county asking for the appointment of a receiver to wind up the affairs of the so-called Ton-A-Ford Truck Company; that a receiver was appointed who took charge of the assets of the company and sold the same; that due notice was given to the various creditors of the company, and a large number of claims, aggregating 120 in number, were filed in the receivership proceedings; that the plaintiff filed its claim 15th day of February, 1918, being represented by counsel; that the assets of the so-called Ton-A-Ford Truck Company were disposed of and a first and final dividend was distributed to each of the creditors who had filed claims and thereupon the said receiver was discharged; that the plaintiff duly received its dividend out of the receivership proceedings; that the said plaintiff made no effort to bring into the liquidation proceedings any of the assets of the defendants; that said liquidation was closed and the said plaintiff made no appeal therefrom nor filed any objection to the closing thereof."

In addition to this finding of the trial court it appears from the complaint filed in said action, sent us pursuant to a stipulation of the parties, that the action was not brought on behalf of creditors. On the contrary, the complaint prayed that creditors be enjoined from prosecuting any claims against the company during the pendency of the action. The complaint also designated the shareholders in the trust agreement as copartners.

As conclusions of law the court found:

"1. That said so-called trust agreement constituted all the defendants above named, and all those receiving so-called shares or certificates of stock in said Ton-A-Ford Truck Company, copartners, and that at the time of the delivery of said merchandise by said plaintiff all of said defendants, excepting only the defendant Silver Iron & Steel Company, were in fact copartners in said enterprise.

"2. That the printed clause at the bottom of the letter of said defendants signed 'Ton-A-Ford Truck Company,' under date of January 11, 1917, in no manner limits or affects the liability of said defendants as copartners for the payment of said merchandise delivered by said plaintiff.

"3. That the plaintiff, by filing its claim in the municipal court at Racine county, Wisconsin, and participating in the proceedings and accepting and receiving the dividend without having recourse in said proceedings to the individual property of the alleged partners, has lost the right to recover in this action, and that said proceedings in municipal court constitute a bar to the plaintiff's right of recovery herein.

"4. That the defendant Silver Iron & Steel Company is not in any way liable to the plaintiff because it did not become the owner of any stock nor did it become interested in the so-called Ton-A-Ford Truck Company until after the indebtedness sued upon in this action accrued.

"5. That the defendants who have appeared in this action are entitled to judgment herein dismissing the plaintiff's complaint with costs."

From a judgment entered accordingly the plaintiff appealed.

For the appellant there was a brief by *Hand & Quinn,*

attorneys, and *Fulton Thompson,* of counsel, all of Racine, and oral argument by *E. B. Hand.*

For the respondents there was a brief by *Gittings, Janecky & Wilbershide,* attorneys for *Roy A. Spencer, James Hoffman,* and *Peter B. Johnson;* by *Guy A. Benson,* attorney for *Eina Beck, Miller Peterson,* and *Albert L. Flegel,* and by *Elmer E. Gittins,* attorney for *Fred W. Plath;* and the cause was argued orally by *Leonard P. Baumblatt* and *A. R. Janecky,* all of Racine.

VINJE, J. The trial court correctly concluded that the defendants were copartners so far as the plaintiff's claim was concerned, for, conceding the validity of the trust agreement, they never held themselves out as doing business thereunder. It is therefore not necessary to set out the terms thereof nor to pass upon its validity. The clause quoted from their letter would indicate that the Ton-A-Ford Company was a corporation, for in *Carpenter v. McCord L. Co.* 107 Wis. 611, 83 N. W. 764, it was held that a defendant sued as the McCord Lumber Company was intended to be sued as a corporation sufficiently appeared from its name. Here we not only have a corporate name but the letter speaks of the officers and shareholders of the company. But defendants were not incorporated, and since they did not hold themselves out as operating under a trust agreement they were as to plaintiff copartners individually liable for the debts of the concern contracted while they were partners thereof. *Bartelt v. Smith,* 145 Wis. 31, 129 N. W. 782.

It remains to consider whether or not the trial court correctly held that plaintiff could not maintain the action because it had filed its claim in the municipal court and received a dividend thereon in the action begun by one of the partners, Harry J. Sanders, and had not further prosecuted its claim in that action. The trial court seems to have regarded that action as a creditor's action, and its findings of fact were not sufficiently definite to fully and truly charac-

terize it, though the findings and testimony did not show anything further than a winding-up action between partners. That such was the nature of the action became certain by the complaint therein, submitted by stipulation. It appears therefrom not only that it was not brought on behalf of creditors, but that it prayed for an order restraining them from prosecuting their claims therein. Under such circumstances they may file their claims, receive a dividend, and in separate actions have recourse to the assets of the individual partners, for in the partnership action to wind up its affairs the receiver occupies the same relation to the creditors that the firm did before his appointment. The rule is thus stated in High, Receivers (4th ed.) p. 704:

"Where, however, the receiver is appointed for the settlement of the affairs of a partnership, not at the instance and for the benefit of creditors but upon the application of one of the partners against the other, such receiver is in no sense a representative of the creditors of the firm and he accordingly occupies no better position than the firm with respect to its property, and he can assert no greater right or title with reference to the business and property of the partnership than could the members of the firm themselves."

He does not represent the creditors. *Weber v. Weber,* 90 Wis. 467, 63 N. W. 757. Since they are not parties to the action they cannot marshal partnership assets therein, and the fact that they have received a dividend does not bar them from recourse to the liability of the individual partners. The trial court, therefore, erred in holding that plaintiff was barred by filing its claim in the municipal court action and in failing to further prosecute its claim therein against the partners.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

BURMEISTER, Respondent, vs. WOLFGRAM and wife, Appellants.

November 17—December 13, 1921.

Contracts: Construction of building: Evidence: Waiver: Defective work: Measure of damages: Implied warranty of competency by builder.

1. In an action to foreclose a mechanic's lien, filed for work performed and materials furnished under a building contract, the evidence is *held* to support the findings of the trial court as to the aggregate time plaintiff and his employees were engaged in the work.
2. The evidence is also *held* to support the finding of the court that there was such a substantial performance of the contract as entitled plaintiff to recover, the defects being open to observation, and defendants expressing satisfaction from time to time, and so ought not in equity and good conscience to be permitted to assert claims for such defects.
3. Where defects in work under a building contract cannot be presently remedied at a reasonable expense without any great sacrifice of work or material already wrought into the building, the proper measure of damages is the diminished value of the building as turned over to the owner as compared with its value if completed according to the contract.
4. Even though there was no express representation by one taking a contract to erect a building as to his skill and competency as a carpenter, the law implies an undertaking on his part that he possesses the requisite skill from the fact that he assumed to perform the work.

APPEAL from a judgment of the circuit court for Walworth county: E. B. BELDEN, Circuit Judge. *Modified and affirmed.*

The plaintiff is a building contractor in the village of Lyons, Walworth county; the defendant a physician of the same place, the defendant *Olga* his wife.

Shortly before January, 1920, the plaintiff and defendants made an oral contract by which the plaintiff was to do the necessary carpenter work in the erection of a dwelling house for the defendants in said village and was to charge for his own time and that of his workmen. The agreed rate

per hour that should be paid for such services does not appear in the evidence, but no question is here raised about that, and it was understood that plaintiff was to complete the work. The house was to be constructed, so far as the carpenter work was concerned, from materials and plans furnished by a firm in Chicago, dealers in so-called "Ready-cut" houses, subject to some changes as to finishings as agreed upon by the parties. Such plans appear to have been used in the construction of the building, but they were not made a part of the record.

The defendants lived across the street from the new building and one or the other visited the work almost daily, the defendant *Otto J.* keeping a memorandum as to apparent absences of the plaintiff or his workmen on certain days.

From February 25th on plaintiff claims to have entered practically every day during the work the number of hours of service rendered by himself or his workmen in a record book. No itemized statement of such services or of material purchased by plaintiff was rendered by plaintiff or demanded by defendants during this construction.

The plaintiff charged for his own time at the rate of sixty-five cents an hour, and for the time of his employees he charged the defendant five cents an hour over the amount paid such laborers, such payments in all instances aggregating no more than sixty cents and for some of the labor forty-five cents per hour. The total charge was $1,232.19 for labor and $324.26 for material, a total of $1,556.45, upon which payments had been made at intervals aggregating $700, leaving a balance claimed due of $856.45, for which amount the plaintiff filed and claims a lien.

The defendants' answer put in issue the truth of the statement as to the labor and materials as claimed by plaintiff, and asserted a counterclaim to the effect that at the time of the making of the agreement between the parties the plaintiff represented to defendants that he was a competent builder and contractor and that such representation was re-

lied upon by defendants in giving such contract to the plaintiff. That the work was done by plaintiff in a careless and unskilful manner, and that as a result the house was poorly built, to defendants' damage in the sum of $800.

And by a second counterclaim defendants sought to recover, on the same grounds as those stated in the first counterclaim, the $700 paid plaintiff. Upon these counterclaims defendants asked for $1,500 damages. The reply admitted that plaintiff held himself out to the defendants as being a competent workman; alleged the constant examination and supervision of the work by defendants; and denied the allegations of the counterclaim upon which damages were sought to be predicated.

At the close of the trial and here defendants claim that under the testimony they are entitled to an allowance of $1,000 as being the amount it would cost to make the necessary changes in the building as completed to conform to the building as contemplated and if done in good workmanlike manner, no question being raised as to the item of $324.26 for materials.

The court made findings usual and appropriate to such a lien action and that there was due the plaintiff the amount as claimed by him of $856.45 and allowing interest thereon from September 11, 1920, being the last day of work done upon the premises, and made the usual provisions for foreclosure.

In a written decision made a part of the record prior to the signing of the findings, the trial court stated his views on the questions presented, and the defendants, in addition to excepting to the findings, filed exceptions to certain portions of such written decision.

It appeared that after the plaintiff finished his part of the work there was stucco plaster put on the outside of the building and painting or staining done on the inside by other contractors.

From the judgment entered in favor of the plaintiff for the full amount of his claim the defendants have appealed.

For the appellants there was a brief by *Johnson & Rogers* of Whitewater, and oral argument by *Easton Johnson*.

E. John Wehmhoff of Burlington, for the respondent.

ESCHWEILER, J. Interest was allowed on the amount found due from the date of the completion of the work instead of from the commencement of the action. Specific objection was first raised on this point on this appeal. The plaintiff consented on the hearing here that such modification should be made, and the judgment must be lessened by $12, being such difference.

Defendants further contend that the amount of the damages allowed was excessive in so far as it contained certain items for labor charges as to times when, according to defendant's testimony, the specific services so charged for were not rendered by reason of the absence of the plaintiff or certain of his employees, the amount aggregating about $29. The defendant, referring to notes made in a memorandum book from time to time, testified in support of his contention in that regard. The plaintiff, supported to some extent by certain of his workmen, testified to the contrary. He also testified to items of about $4 which were entered in the time-book but not in the statement rendered. We think it presented a situation where the trial court must be supported in his conclusion on that question.

As to other items aggregating about $32, it appears that on certain of the days for which plaintiff was allowed charges for his own time he also entered in the same book charges for services rendered by him for another person on the same dates. The total of the hours charged as against the defendants and such other person aggregated considerably over ten hours on particular days, in one instance as much as nineteen hours. As to the first of such items plaintiff's testimony was to the effect that the charge made on that day, February 25th, included a number of prior charges kept on slips of paper for odd hours worked by him on this job and that of such other person, and were respec-

tively lumped in the charges on that date. As to the other of such items plaintiff testified that they included necessary machine work done by him at his own shop and either before or after the usual working hours, that for services of that kind the reasonable charge was $1 instead of sixty-five cents per hour, and that he arrived at the respective entries made by charging for additional time at the lesser rate in order to make a reasonable charge for the actual service rendered.

These items also present a situation from which we think, under the testimony, that the conclusion of the trial court cannot be disturbed.

The most substantial objection urged by the defendants is based on their claim for $1,000 on the ground that the plaintiff's work was so negligently done that it would require at least $1,000 to now so construct it as to make it substantially conform to the requirements of good and competent workmanship,—it being claimed that two pillars on the front porch were misplaced by two or four inches each and that to now properly adjust this would cost about $200; that there was improper placing of the rafters over a bay window, causing a sagging, leaking, and uneven appearance to the roof over such window and which would involve a cost of from $75 to $100, and that the balance of the $1,000 would be required to remedy alleged defects in the beam ceiling on the first floor, imperfect hanging of doors and construction of cabinet work, and the improper putting on of certain of the hardware fixtures. Substantially all of such proposed changes would involve the tearing down and destroying of a great deal of the work done by plaintiff and also of work done subsequent to his by the other contractors, such as the stucco work on the outside of the building and the staining or painting inside.

The trial court determined, as is evident from the express language in his written decision and from his findings, that there was a substantial performance by plaintiff of his contract obligation; that the defendants expressed satisfaction

from time to time with the work during its progress; that the defects complained of were of such a nature as to be open to the observation of the ordinary layman, and that the defendants ought not, in equity and good conscience, be permitted to now assert a claim for such a large amount of damages based upon a situation which by their failure to protest at the proper time was in effect acquiesced in by them. The record, negatively at least, discloses that no protest or objection was raised by defendants with reference to the material features of the items here involved during the progress of the work or prior to the doing of the work by the other contractors.

From a consideration of the testimony we somewhat reluctantly come to the conclusion that the result reached by the trial court must stand. Defendant's brother-in-law, who had had some years experience in carpenter work and had been present and helping to some extent on the construction of the building during plaintiff's employment, testifying as an expert witness for defendants, stated that he noticed a few places in the beamed ceiling where nails were driven so as to be partly exposed and a number of hammer marks, indicating a failure to use a proper nail-set. The painter who worked on the inside of the building and called as defendants' witness says that the defects, particularly with reference to the beam ceiling, were such that unless a person were blind he could see them on entering the house.

The defendant *Otto L. Wolfgram* testified that while he saw how things were progressing and visited there almost daily, yet he did not appreciate the full extent of the work that was being delivered to him. He seems to have gone no further in his testimony than this as to denying any observation or knowledge of the existence of the defects now complained of prior to the time plaintiff left the work. The plaintiff testified that during its progress defendant *Otto L.* frequently expressed satisfaction with the work being done, and also that on one occasion, when a dispute arose as to the

particular manner in which the beam ceiling was to be constructed, he, the plaintiff, offered in effect to cancel the contract between them so far as the completion of the work was concerned and permit some one else to finish it if the manner in which plaintiff was doing it was not satisfactory to defendants. Defendants do not deny that such suggestion was made and did not act upon it.

Furthermore, it clearly appears that defendants on the trial relied upon and here assert a mistaken position as to the proper measure of damages. The rule applicable here is stated in the case of *Buchholz v. Rosenberg,* 163 Wis. 312, 156 N. W. 946, and cases there cited. That rule is that, where defects complained of could not be presently remedied at a reasonable expense without any great sacrifice of work or material already wrought into the building, then, as in the present situation, the proper measure of damages is the diminished value of the building as turned over by the builder to the owner from its value if completed according to the contract and without the complained of defects. No evidence is in the record upon such measure of damages.

Defendant has complained that the statement made by the trial court in his decision though not incorporated in any specific finding, that no representation was made by the plaintiff as to his possessing skill and competency as a carpenter, cannot be supported. This contention is correct because the plaintiff expressly admitted such representation by his reply and by his testimony. Even had there been no express representation in that behalf the law would, as to a person assuming to perform such work, imply an undertaking on his part that he did possess the requisite skill. *Eaton v. Woolly,* 28 Wis. 628, 630; *Norris v. Cargill,* 57 Wis. 251, 255, 15 N. W. 148. In view of the other findings and the present disposition of this case we do not deem such determination of the trial court of sufficient materiality or weight to change the result.

By the Court.—Judgment modified by deducting from the face thereof the sum of $12, and as so modified affirmed, with costs here to respondent.

DEAN, Respondent, vs. WENDEBERG and another, Appellants.

November 17—December 13, 1921.

Brokers: Contract of employment: Made in Illinois and relating to lands in that state: Performance by broker: Failure of principal to complete sale: Cancellation of sale contract: Recovery of commissions.

1. Sec. 2305*m*, Stats., requiring contracts agreeing to pay a commission for the buying or selling of real estate to be in writing, does not apply to a contract made in Illinois and relating to lands in that state.
2. A real-estate agent is entitled to his commission if he has produced a person ready, willing, and able to buy on the terms authorized by the vendor.
3. In the absence of an agreement to the contrary, the commission is earned when the proposed purchaser is willing to enter into an agreement on the terms specified by the owner. While an enforceable agreement may be made providing that the commission shall not be paid until the transaction is completed, the owner cannot avoid paying a commission if by his fault, misconduct, or wrongful neglect he prevents the consummation of his contract with the buyer.
4. Where the contract between the vendors and a purchaser procured by a broker was valid and the refusal of the vendors to live up to its terms was without justification, the broker was entitled to his commission.
5. The fact that the purchaser was willing to cancel the contract with the owner is no proof that the contract was induced by fraud.

APPEAL from a judgment of the county court of Walworth county: DAVID W. AGNEW, Acting Judge. *Affirmed.*

Action by a real-estate broker to recover a commission of $793.12 on a contract relating to a sale of land in the

state of Illinois. The complaint set out the contract, the material part of which is as follows:

". . . Said parties of the first part have agreed, and do hereby agree, to pay unto the said *Dean* the sum of $793.12 on March 1, A. D. 1919, provided the said deal for said land between the said first parties and the said Keating is consummated at that time, *i. e.* if the said Keating pay said first parties that part of the purchase price mentioned in the contract between the said Keating and the said first parties and to be paid on March 1, A. D. 1919, then that said *Louisa Wendeberg* and *Charles J. Wendeberg* shall pay the said *Fred Dean* the said sum of $793.12 on March 1, A. D. 1919.

"It is further agreed between the parties hereto that even although said contract between said parties of the first part and the said Keating is not fully consummated on March 1, A. D. 1919, or in case there should be any new or different contract between the said parties of the first part and the said Keating at any time hereafter, then that the said *Dean* shall, nevertheless, be entitled to his said commissions of $793.12 on March 1, A. D. 1919."

The material part of the contract above mentioned between Keating and defendants provided that Keating, in consideration of defendants' equity in a certain farm, should pay them $11,727, $5,000 of which was to be in cash and the balance in six notes for $6,000, the notes being secured by a second mortgage on a farm in the vicinity. Both contracts were made June 5, 1918. Payment and transfer of title were to take place March 1, 1919. On February 28, 1919, defendants and Keating rescinded the contract of sale.

It is undisputed that defendants knew that the mortgage they agreed to take in exchange was subsequent to a prior mortgage of $25,000; that defendants visited the mortgaged premises; and that they consulted their attorney concerning the transaction previous to making the agreement.

As to the value of the mortgaged farm and the notes in question, Keating testified that when the first mortgage was

foreclosed he did not bid because by agreement with the buyer he was to receive from him the full amount of his second mortgage, which agreement was carried out.

The substance of the findings will be stated in the opinion. Judgment was ordered for plaintiff for the full amount of his claim.

For the appellants there was a brief by *E. L. von Suessmilch* and *C. J. Sumner,* both of Delavan, and oral argument by *Mr. Sumner.*

For the respondent there was a brief by *J. W. Page* of Elkhorn, attorney, and *B. F. Manley* of Harvard, Illinois, of counsel, and oral argument by *Mr. Manley.*

JONES, J. The contract sued on was made in the state of Illinois, hence the Wisconsin statute relating to contracts for brokers' commissions is not involved.

Ordinarily a real-estate agent is entitled to his commission if he has produced a person ready, willing, and able to buy on the terms authorized by the vendor. In the absence of any agreement to the contrary, the commission is earned when the proposed purchaser is able and willing to take the property or enter into a valid contract upon the terms which have been specified by the principal. *Willes v. Smith,* 77 Wis. 81, 45 N. W. 666; *Rees v. Spruance,* 45 Ill. 308; *Wilson v. Mason,* 158 Ill. 304, 42 N. E. 134. See many cases cited in 44 L. R. A. 593.

In order to protect himself the vendor may include in the agreement with the broker a provision that the commission shall not be paid unless the deal is consummated, and of course such an agreement should be enforced according to its terms unless some good reason is shown to the contrary. *Felts v. Butcher,* 93 Iowa, 414, 61 N. W. 991; *Flower v. Davidson,* 44 Minn. 46, 46 N. W. 308; *Stewart v. Fowler,* 37 Kan. 677, 15 Pac. 918.

But it would be manifestly unjust that the principal could avoid paying a commission fairly earned if by his own fault

or misconduct or wrongful neglect he has prevented the consummation of his contract with the buyer, and the courts will not sanction such injustice. *Phelps v. Monroe,* 166 Wis. 315, 165 N. W. 471; *Willes v. Smith,* 77 Wis. 81, 45 N. W. 666; *Bowe v. Gage,* 132 Wis. 441, 112 N. W. 469; *Fox v. Ryan,* 240 Ill. 391, 397, 88 N. E. 974; *Brown v. Wilson,* 98 Iowa, 316, 67 N. W. 251; *Smith v. Schiele,* 93 Cal. 144, 28 Pac. 857; *Gilder v. Davis,* 137 N. Y. 504, 33 N. E. 599. See note to *Brackenridge v. Claridge* (91 Tex. 527, 44 S. W. 819) 43 L. R. A. 593.

It is the question in this case whether the plaintiff should be deprived of his commission because, under the circumstances, the defendants refused to complete the agreement to sell. They contend that the contract with the purchaser was procured by fraud and therefore they were under no obligation to complete it. Whether, if the fraud were proved, this would be a defense to an action on this contract for commissions, it is not necessary to decide.

The trial court found, in substance, that plaintiff and Keating had made no false representations; that defendants made the agreement knowing all the facts; and that the agreement was made after defendants had consulted their attorney and personally inspected the farm; that the contract between Keating and defendants was valid and enforceable up to the time of rescission; that the refusal of defendants to live up to it was "wilful and arbitrary and without any legal justification or excuse;" and that the agreement to rescind made by defendants and Keating on February 28, 1919, constituted a new contract.

In our opinion the findings of fact were fully justified. This does not come within that class of cases where the representations relate to the value of property so far distant that investigation would be expensive and difficult, or to representations made to ignorant persons, or by those acting in a fiduciary capacity.

The defendants had every opportunity before the con-

tract to make full and easy investigation as to the value of the land covered by the securities they agreed to take. It is by no means clear that the notes and mortgage were not worth their full face value, since it appears that their full value was realized by Keating, the owner, and there seems no good reason why defendants could not have obtained their face value if they had completed the transaction and used reasonable care.

Appellants' counsel urge that the willingness of Keating to cancel the contract afforded some evidence of the fraud. There are two obvious answers to this argument. He may not have supposed the trade so advantageous to himself that it was best to bring an action for specific performance. Moreover, it not infrequently happens that parties prefer to forego some legal right rather than undergo the expense and annoyance of long litigation. Such choice does not necessarily call for any unfavorable inference. There is no proof that the plaintiff made any false representations, and it is clear that he fully and fairly rendered the service contemplated by the agreement.

There is considerable discussion in the briefs whether the voluntary cancellation of the contract by defendants and Keating was a "new or different contract" within the meaning of the brokerage agreement. It is also argued by respondent with much force that it was the legal effect of the brokerage agreement that the commission had already been earned and that there was no condition of payment but only a clause fixing the time of payment beyond which plaintiff would not be required to wait in any event.

According to our view, since there is ample evidence to sustain the findings of the trial court on the points already discussed, it becomes unnecessary to consider these questions.

By the Court.—Judgment affirmed.

L. J. MUELLER FURNACE COMPANY, Respondent, vs. HOLMES, Appellant.

November 18—December 13, 1921.

Master and servant: Discharge: Justification: Employee declining to obey proper orders: Corporations: Issue of stock: Validity: Consideration.

1. Defendant, under contract for a fixed period as superintendent of plaintiff, a manufacturer of furnaces, stated to the general manager that he had conceived an idea as to a smokeless furnace and was requested from time to time to put the idea into concrete form. He finally declined on the ground that the requested service could not be brought to a successful termination within the remaining period of his employment, and when plaintiff refused to promise additional compensation for work to be done after such period defendant left plaintiff's service. *Held,* that if the conversation be considered as a discharge it was justified, and if it be deemed a reason or excuse for defendant ceasing to render service it was insufficient.
2. A corporation could not lawfully issue stock to an employee without consideration, no change being made in the contract of employment, and stock so issued is void.

APPEAL from a judgment of the circuit court for Milwaukee county: WALTER SCHINZ, Circuit Judge. *Affirmed.*

For a long time prior to 1906 and thereafter the plaintiff was a corporation extensively engaged in business in Milwaukee and its stock was practically all owned by Mr. L. J. Mueller, Sr., and members of his family. In 1906 the same individuals organized the Manufacturers Foundry Company (hereinafter designated as M. F. Co.). In October, 1906, such M. F. Co. made a written contract with defendant by which he was employed as foreman in that company's foundry, commencing December 1, 1906, at a then salary of $1,800 per year. This was subsequently increased to $2,500 and thereafter to $3,000. The business of the M. F. Co. was for a number of years not profitable, but in 1914 it realized large profits. In that year, at de-

fendant's suggestion, an agreement was made that he should have, in addition to his salary during the following year and as a bonus, twenty-five per cent. of any profits made in excess of $40,000 during that year. Large profits were made and his share thereof was over $6,000, part of which was paid to him by canceling a note for moneys theretofore borrowed by him and the rest of which he received. Such agreement for a bonus was not renewed. In January, 1916, the M. F. Co., by resolution of its stockholders and directors, at a meeting where defendant was present as stockholder, director, and officer, determined to dispose of all of its property to the plaintiff, such company to assume all the liabilities of the M. F. Co., and that the stockholders of the M. F. Co. were furthermore to surrender all their stock in such corporation and that subsequent proceedings be taken to legally dissolve that corporation. A formal resolution to dissolve the M. F. Co. was made a matter of record in the minutes of that company signed by the defendant as vice-president on February 23d. Thereafter defendant continued to work for plaintiff with no change in the nature of his services, and thereafter, as before, he was under the immediate direction of Mr. L. J. Mueller, Jr.

In July, 1916, defendant executed a promissory note to the plaintiff for $500 payable August 31, 1916. At about the same time a contract was made between the plaintiff here and the defendant wherein the defendant was to remain as foreman or superintendent at a salary of $500 per month until the 1st of July, 1917. Subsequently this period was extended to August 1, 1917. Defendant's intention to go into business for himself had been communicated to the plaintiff company in about June, 1916, and arrangements were made to meet that situation by the then employment of a new foreman or superintendent who was ultimately to take over defendant's work and his work was thereafter shared to some extent with such new superintendent, defendant giving his time more particularly to looking after the

construction of a new plant which was then in process of erection by plaintiff.

Plaintiff had been for some time interested in the subject of the possibility of devising or constructing what was considered of great value in the business in which it was engaged, namely, a smokeless boiler. One Fancher had devoted considerable time at plaintiff's plant on the planning or inventing of some such device, but no substantial result was obtained. At the instigation of Mr. L. J. Mueller, Jr., defendant, who had expressed considerable interest in the same subject and had also worked with Mr. Fancher, in October, 1916, went to St. Louis with Mr. Mueller to examine a device there installed. Castings were shipped to plaintiff's plant at Milwaukee and work done by defendant on them, but they were found unsuitable. About the same time defendant suggested to Mr. Mueller that he had an idea that he thought might be developed into an invention or device for such desired smokeless boiler and he was from time to time thereafter requested by Mr. Mueller to embody such idea in a sketch or drawing.

Defendant devoted considerable time outside of the usual hours of employment in plaintiff's business, and no question is raised but that he rendered faithful and valuable services to it during the period of his employment.

As the time approached in which defendant was to leave, Mr. Mueller became more insistent about something being done in this matter. It finally culminated on July 26th in a conversation between the two, in which Mr. Mueller insisted that something should be done by defendant in the form of plans or drawings embodying his idea of a smokeless boiler, or in default thereof defendant should leave, defendant insisting that what was then being requested of him by Mr. Mueller was impossible to be done during the period then remaining of his employment, and suggesting, in effect, that if his work in that connection should run over the period of his employment he should expect additional compensation

Mr. Mueller refused to accept any obligation so far as additional compensation was concerned. As a result of the situation thus presented the defendant left plaintiff's employment on the same day and rendered no further services.

Thereafter plaintiff commenced an action for a balance claimed to be due on the $500 note of defendant to it in 1916 above mentioned. Defendant denied liability on the ground that it had been agreed between the parties that defendant should be permitted to pay said note in full by his services during the month of July, 1917, and that by being discharged from such service by the plaintiff by virtue of what took place on the 26th between Mr. Mueller and himself, he had been unlawfully discharged and thereby prevented from so paying said note, and that being ready and willing to continue in such employment his services for such month of July would be full payment of said note.

Defendant's counterclaim: As to this, defendant alleged that as part compensation for defendant's services as vice-president of the M. F. Co. the directors of that corporation prior to March 1, 1910, duly authorized the transfer of fifty shares of the full-paid capital stock of said corporation, of the par value of $100 a share, to defendant; that such shares were duly transferred upon the books and became the defendant's personal property. That about February 1, 1916, such M. F. Co. was dissolved, the plaintiff company taking over all its assets and assuming all of its liabilities. That defendant never received any share in the distribution of the assets of said M. F. Co. and no consideration for his stock or interest in the assets of said M. F. Co., and that plaintiff is indebted to defendant in the sum of $1,883.50, the market value of said stock on January 29, 1916. For such amount, with interest, defendant demanded judgment.

The plaintiff's reply alleged the subscription by defendant for one share of the capital stock of the M. F. Co. and his agreement to pay the par value thereof; that by resolution in 1908 the board of directors of said M. F. Co. authorized

additional subscriptions to its capital stock, and that the defendant thereupon subscribed for forty-nine shares and agreed to pay the sum of $4,900, and that it was understood and agreed that payment for such stock could also be made by the application of dividends declared in favor of the same. That defendant never paid any money for said stock and that no dividends were declared upon it, and then recited the carrying out of the resolution above specified as to the dissolution of said M. F. Co. and the turning over of its assets to and assuming the obligations of the said M. F. Co. by the plaintiff and that such was done by unanimous vote of all the stockholders of the said M. F. Co., including the defendant, and that the stock was surrendered and canceled and that there is nothing due defendant on account of such note.

The minute books of the M. F. Co. were received in evidence and show the various proceedings substantially as above recited. No payment was made or offered by defendant on account of such subscription or demand for any such payment by the M. F. Co. and no dividends declared by that company.

On January 29, 1916, Mr. Mueller gave to defendant, at his request, a memorandum reading as follows: "Value of *Holmes* stock with interest $1,883.50 (deficit $3,116.50)."

These figures, as appears from the evidence, were taken from a memorandum furnished by accountants who at about that time examined the books of the M. F. Co.

There was further testimony by Mr. Schlueter, plaintiff's purchasing agent and who kept the confidential books or records of the plaintiff and was familiar with its affairs and those of the M. F. Co., that at the time of the turning over of said corporation to the plaintiff there was no value to its capital stock and that its liabilities were about $70,000 in excess of the assets.

Upon the trial of this action in the civil court before a jury the jury answered "Yes" to the following question in a special verdict: "Under all the facts and circumstances sur-

rounding the parties on the 26th day of July, 1917, was the request by the plaintiff, through L. J. Mueller, Jr., of the defendant, *Charles G. Holmes,* unreasonable?" The trial judge changed the answer to such question from "Yes" to "No," dismissed the defendant's counterclaim, and directed judgment for plaintiff upon the promissory note for a balance determined to be due. (Other items of account were at issue between the parties but are not material here.)

Defendant appealed from the judgment so entered to the circuit court and the judgment of the civil court was there affirmed. From the judgment entered in accordance therewith the defendant has appealed.

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Arthur B. Doe,* of counsel, and oral argument by *Howard T. Foulkes,* all of Milwaukee.

For the respondent there was a brief signed by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* of counsel, all of Milwaukee, and oral argument by *Julius E. Roehr.*

ESCHWEILER, J. Whether the testimony of defendant or Mueller as to the exact language used in the interview between them on July 26th when the relationship of employer and employee terminated be considered as the more correct recollection of what actually was said, we deem entirely immaterial.

From defendant's own testimony on direct and cross-examination the following facts appear: Defendant was the trusted employee of plaintiff, holding an important position of an executive nature as foreman or shop superintendent, continuing from the same position and situation that he had occupied prior to February 1, 1916, with the M. F. Co. As such foreman or superintendent he was at all times under the direction and supervision of Mr. Mueller, the secretary and general manager of the plaintiff. Repeatedly from the fall of 1916, when defendant had stated to Mr. Mueller that he had formed some idea as to a design for a smokeless furnace,

Mr. Mueller had requested defendant, in view of the approaching termination of their relationship, to put such idea into some concrete form by way of sketch or drawing.

From these and other undisputed facts it must be held that the request made by Mr. Mueller that defendant should devote the remainder of his time and attention while in plaintiff's employ to that express purpose was important and material. It involved no departure from the high grade of service which defendant had been rendering and for which he had been employed. Whether or not such requested service could be brought to a successful or practical termination within the period still left of defendant's employment was a matter of concern to plaintiff and not to defendant. Under such a situation there is no escape from the conclusion as a matter of law that defendant's wilful refusal to enter upon such required service was unjustifiable and a breach of his contract duty and obligation. If what followed be considered as a discharge of defendant by plaintiff it was justified. If it be considered a reason or excuse for defendant's ceasing to render service it was insufficient. Such conclusion is supported by the decisions. *Green v. Somers,* 163 Wis. 96, 100, 157 N. W. 529; *Green Bay F. Co. v. Jorgensen,* 165 Wis. 548, 552, 163 N. W. 142; *In re Milwaukee M. Co.* 246 Fed. 671, L. R. A. 1918C, 1027 and note p. 1030; *May v. New York M. P. Corp.* (Cal.) 187 Pac. 785, 788; note in 24 L. R. A. N. S. 814.

The defendant was not entitled to recover under his counterclaim. The forty-nine or fifty shares of stock of the M. F. Co. for which upon the undisputed record he had ostensibly subscribed could not have been lawfully issued to him and would have been void under the provisions of sec. 1753, Stats., except issued in consideration of money or labor or property at its true money value actually received by the corporation to the par value. Considering his own evidence alone, including his examination under sec. 4096, Stats., prior to the trial in the civil court, and which, although re-

turned with the record here, does not seem to have been offered in evidence on the trial but yet is referred to by defendant on this appeal, it appears that the subscription for the forty-nine shares of stock was made after defendant had an existing contract of employment with the M. F. Co.; that no change was then made in such contract; that the corporation received nothing of value at the time of the subscription from the defendant nor any obligation other than the form of his subscription. It was, under defendant's own testimony, a pure gratuity. Had the certificates of stock been actually made out for such subscription and delivered to defendant, it would nevertheless have been a void issue and he could have obtained no rights thereby as against the corporation. *Thronson v. Universal Mfg. Co.* 164 Wis. 44, 49, 159 N. W. 575; *Tramp v. Marquesen,* 188 Iowa, 968, 176 N. W. 977. He surrendered nothing of value at the time of the dissolution of the M. F. Co. There was nothing pleaded, proven, or offered to be proven by defendant tending to show anything in the nature of a valid and binding contract between them whereby defendant was to receive anything from the plaintiff for such surrender. The errors claimed to have been made on the trial as to the rejection of evidence offered by defendant, including the memorandum as to the value of defendant's stock which is set out in the statement of facts, could in no wise have prejudiced the merits of defendant's position on this branch of the case.

By the Court.—Judgment affirmed.

GUARDIANSHIP OF THIENHAUS. [Two appeals.]

November 18—December 13, 1921.

Contracts for benefit of third person: Validity: Insurance: Agreement in divorce proceedings: Son of parties as beneficiary: Gifts from guardian to ward.

1. An agreement made between two persons for the benefit of a third, based upon a sufficient consideration, is enforceable by such third person.
2. In an action to determine the ownership of deferred dividends accruing under a tontine life insurance policy, it appeared that in a divorce action between the insured and his wife, the beneficiary named in the policy, they stipulated that the insured should continue to pay the premiums on the policy for the benefit of their son so as to provide for him a good and suitable sum for his education and support, pursuant to which stipulation the divorce decree provided that the policy was to be continued until its maturity and at that time applied for the benefit of the infant son of the parties, followed by an indorsement on the policy by the secretary of the company that "the bonds provided for by policy . . . shall be delivered to the insured's son," and further, that the insured, who was appointed, and acted as, guardian of said son, filed an inventory of his ward's property, in which he stated, among other things, that the property of his ward consisted of the policy in question. *Held,* that the son acquired a right to the deferred dividends by virtue of the agreement entered into between the insured and the beneficiary in the divorce proceedings.
3. Advancements of occasional sums by a guardian to his ward (in this case father and son) were not intended as payments from the estate, but as gifts from father to son.

TWO APPEALS: one from a judgment of the circuit court for Milwaukee county, OSCAR M. FRITZ, Circuit Judge; the other from a judgment of the county court of Milwaukee county, M. F. SHERIDAN, Judge. *Both judgments affirmed.*

On January 26, 1903, the Mutual Life Insurance Company of New York issued to *Carl O. Thienhaus* a deferred dividend tontine life insurance policy, payable in fifteen annual premiums, by which the insurance company promised to deliver to Florence Thienhaus, his wife, five gold bonds,

each for the sum of $1,000, payable in twenty years from date, bearing interest at five per cent. per annum.

Thienhaus and his wife were divorced in July, 1908. It was stipulated and agreed between them that *Thienhaus* should continue to pay the premiums on the life insurance policy in question for the benefit of their son, *Harold F. O. Thienhaus,* pursuant to which stipulation the divorce decree contained this provision:

"The policy for $5,000 is to be continued until its maturity, and at that time to be applied for the benefit of the infant son of the parties hereto, *Harold F. O. Thienhaus.*"

The policy contained this provision with reference to assignments thereof:

"The company declines to notice any assignment of this contract until the original assignment, or a duplicate or certified copy thereof, shall be filed in the company's head office. The company will not assume any responsibility for the validity of an assignment."

In 1908 the following indorsement was made on the policy:

"By mutual consent, and upon request, the bonds provided for by policy No. 1316838 shall be delivered to the insured's son, *Harold F. O. Thienhaus,* if living; if not, to the insured's executors, administrators or assigns.

"W. J. EATON, Secretary."

On October 18, 1911, *Thienhaus* was appointed guardian of his son. On February 27, 1912, he filed an inventory of his ward's property in which he said:

"The property of the above *Harold F. O. Thienhaus* consists of an endowment life insurance policy, due 1917, in the Mutual Life Insurance Company of New York, policy No. 1316838. The guardian, *Dr. C. O. Thienhaus,* makes the payments on this life insurance policy, the premiums now amounting to $458.05, as long as his income allows it. The value of said policy in 1917, in case *Dr. C. O. Thienhaus* should be living at that time, amounts (including deferred dividends) to about $8,000–8,400."

In an annual account filed February 20, 1912, it is again stated that the property of the ward consists of said insurance policy; that the value thereof, including deferred dividends, in 1917 will be between $8,000 and $8,400.

At the time of the maturity of the policy the guardian, by permission of the court, had borrowed for the benefit of the ward the entire loan value of the policy. Upon maturity the accumulated deferred dividends amounted to $2,006.11. For this sum the insurance company sent a check, payable to *Thienhaus,* guardian, or *Thienhaus* as guardian, but the precise manner in which the check was drawn does not appear. *Thienhaus* was told by some one connected with the trust company, which was surety on his bond as guardian, that this money belonged to him. He had the check cashed, receiving therefor two $1,000 bills. In 1918 he was interned as an alien enemy. Shortly prior to his internment he delivered one of these bills to one E. B. Rebholz and took his receipt therefor. He delivered the other bill to Paul D. Carpenter, Esq. When *Thienhaus* was interned as an alien enemy Mr. Carpenter did not know what to do with the money. He did not know whether it belonged to the ward or to *Thienhaus.* If it belonged to *Thienhaus* it was his duty to turn it over to the alien property custodian. Thereupon he filed a petition in the guardianship proceedings in the county court requesting direction as to the disposition of the money, upon which application a guardian *ad litem* was appointed for the ward. The county court ordered that it be turned over to the alien property custodian. The guardian *ad litem* appealed from such order to the circuit court for Milwaukee county. *Thienhaus* intervened in the circuit court and was made a party to the proceedings in his personal capacity. The circuit court entered judgment reversing the order of the county court and adjudging that the guardian, *Carl O. Thienhaus,* account for the sum of $2,006.11 in his report as guardian of said minor, to the county court of Milwaukee county. From such judgment *Carl O. Thienhaus* appeals.

While the appeal just mentioned was pending in the circuit court and before the decision of the court thereon, proceedings were instituted by the guardian *ad litem* in the county court to compel the guardian to file his final account, the said guardian having filed his resignation of the trust, which, however, had never been accepted. That proceeding also involved the question whether the deferred dividends in dispute belonged to *Thienhaus* personally or whether they belonged to his ward. The county court in that proceeding found that the item of $2,006.11, deferred dividends, belonged to the ward and ordered *Thienhaus* to account therefor, to which finding and order *Thienhaus* excepted.

Thienhaus in his final account also claimed an item of $1,000, the same being for disbursements to the amount of $100 each year for ten years which he claimed he paid out for the benefit of his ward. This item of his account was also disallowed by the court, to which the guardian excepted.

From the order of the county court stating the final account, the guardian, *Carl O. Thienhaus,* appealed.

The cause was submitted for the appellant *Carl O. Thienhaus* on a brief signed by *Roehr & Steinmetz,* attorneys, and *Julius E. Roehr,* counsel, all of Milwaukee, and for the respondent on that of *Ernst von Briesen* of Milwaukee, guardian *ad litem.*

OWEN, J. The main questions involved on these appeals being identical, they were ordered consolidated and argued together, and they will be disposed of in one opinion.

The principal question presented is whether the deferred dividends accruing under the life insurance policy belonged to the insured, *Carl O. Thienhaus,* or to his son, the ward. While it was held in *Ellison v. Straw,* 119 Wis. 502, 97 N. W. 168, pursuant to the terms of an insurance policy there under consideration, that the deferred dividends belonged to the insured and not to the beneficiary, it does not necessarily follow that in this case, as between the insured

and his wife, the original beneficiary, the deferred dividends belonged to him, because of the material difference in the provision of the policy here and the one there considered affecting such deferred dividends. The insurance policy considered in *Ellison v. Straw, supra,* provided that upon the completion of the tontine dividend period "The said insured or his assigns, without the consent of any other person named within as beneficiary, if any, shall have the option either: First, to withdraw in cash the accumulated surplus apportioned by the company to this policy," etc., while here the only provision affecting deferred dividends is as follows: "The only distributive share of surplus shall be apportioned to this contract at the expiration of fifteen years from date, provided the premiums are duly paid and the insured is then living, and shall then be paid in gold coin." It will be noted that in the policy we are now considering the company agreed to apportion the distributive share of surplus to the contract "at the expiration of fifteen years from date." There is no express provision in the contract which indicates whether such distributive share of the surplus belongs to the insured or to the beneficiary, while in the policy considered in *Ellison v. Straw, supra,* it was provided that the insured, "without the consent of any other person named within as beneficiary," shall have the options permitted to be exercised with reference to the accumulated surplus which should be apportioned by the company to the policy. For this reason the *Ellison Case* is not necessarily controlling upon the question whether, under the terms of the policy in this case, the deferred dividends or unapportioned surplus accrued to the benefit of the insured or the beneficiary. But whether such deferred dividends belonged to the insured or to the beneficiary under the terms of the policy need not be decided, for the conduct of each has been such as to vest in the son whatever interest either of them had in the policy.

It appears from the findings of the circuit court that in the divorce proceedings between *Carl O. Thienhaus* and his wife

there was a stipulation, as well as findings of fact and judgment, in which the following appears:

"That the defendant (*Carl O. Thienhaus*) is to continue to keep up and maintain, according to the conditions thereof, all the regular payments of premium due thereon of the life insurance policy heretofore taken out by him on his life and now held by him for the following uses and purposes, to wit: (a) The policy 1280780 in the Mutual Life Insurance Company of New York for $5,000 is to be continued until maturity and at that time to be applied for the infant son of the parties hereto, *Harold Friedrich Otto,* so as to provide for him a good and suitable sum for his education or support."

The circuit court further found that by mutual consent the policy here in question was substituted for policy No. 1280780 mentioned in said stipulation, findings, and judgment.

Now what was the effect of the provision above quoted which appears in the judgment of divorce? It will not be contended that the circuit court had jurisdiction in the divorce proceedings to divest the husband of property and vest title thereto in the children. Neither did it have authority to divest *Thienhaus* of any interest he might have had in the insurance policy and vest title thereto in the son, *Harold F. O. Thienhaus.* But it was competent for Mr. and Mrs. Thienhaus, the insured and the beneficiary, to agree that they would both turn their interests in such policy over to the son. This was an agreement made by the parents for the benefit of the son and enforceable by him. This is the effect of the stipulation made between the parents and filed in the divorce action. It was agreed that *Carl O. Thienhaus* shall make all the regular payments of premiums due on the policy until maturity, at which time the proceeds are to be applied "for the infant son of the parties hereto, *Harold F. O. Thienhaus,* so as to provide for him a good and suitable sum for his education or support." True, it is not stated in so many words that the proceeds of the policy are to be applied

for the infant son, but such is the evident intention of the parties. The provision is not that the son shall be substituted for the beneficiary. The agreement is that the insurance policy shall be "continued until maturity and at that time to be applied for the infant son of the parties hereto." This means the entire policy, or the entire proceeds of the policy. It is not limited to that portion of the policy to be paid to the beneficiary. The stipulation was followed by directions to the company resulting in the indorsement on the face of the policy signed by W. J. Eaton, secretary, set forth in the statement of facts; then followed the guardianship proceedings and the inventory of *Carl O. Thienhaus,* the guardian, and the insured named in the policy, from which it plainly appears that he regarded the son as the beneficiary of the entire proceeds of the policy; then comes the check to cover the deferred dividends, made payable to *Carl O. Thienhaus* as guardian; the manifest doubt which he had at that time as to whether these dividends belonged to him individually, and the further fact that he never, at any time, claimed to be the owner of such dividends. His testimony before the circuit court was to the effect that he did not know whether the deferred dividends belonged to him or not. From these facts we conclude that the son acquired an undoubted right to the deferred dividends by virtue of the agreement entered into between the insured and the beneficiary in the divorce proceedings. This was an agreement made between two persons for the benefit of a third based upon a sufficient consideration and enforceable by such third party. It therefore makes no difference whether under the terms of the policy the deferred dividends belonged to the insured or to the beneficiary, as the only two parties who were interested in the proceeds of the policy agreed that the same should be paid to the son.

Upon the appeal from the order of the county court the further question arises whether that court properly disallowed an item of $1,000 claimed by the guardian in his

final account, which item is made up of sums of $100 per year for ten years, and which it is claimed was expended from the guardian's estate for the benefit of the ward. The evidence in support of his claim rests solely upon the testimony of the guardian, who testified that he frequently gave *Harold* money for extras and contributed to a certain extent to his clothes, ties, etc. "I only made an approximate estimate of what I gave him during the course of a year; I think it really might have been more than that. I kept no record of it; I never thought it would come to that and I never claimed it neither; I think these amounts would aggregate $100 a year on the average, including trips that I had to make down there for the purpose of seeing him, etc. I first made up my mind to charge for these items in my guardianship account when I saw that my financial condition was such that I believed I owed it to myself." As to these items the county court found that they were occasional sums which were given to said minor as gifts from father to son. The testimony of the guardian clearly indicates that when such amounts were disbursed by him they were not intended as payments from the estate to the ward, but were gifts from father to son, and the county court very properly refused to allow the same.

By the Court.—The judgment of the circuit court is affirmed. The judgment of the county court is affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY and another, Appellants, vs. RAILROAD COMMISSION and another, Respondents.

November 18—December 13, 1921.

Public utilities: Right of railroad to remove spur track: Jurisdiction of railroad commission: Equity: Injunction: Order of railroad commission to replace track.

1. The act of a railroad company, believing in good faith that it had a right to do so, in peaceably tearing up one of its spur tracks in a hasty manner early in the day, though for the purpose of avoiding litigation, annoyance, or delay and of accommodating another shipper, will not preclude it from seeking the aid of a court of equity by application for a temporary injunction against the enforcement of an order of the railroad commission to replace the track.
2. One of the ancient maxims of equity is that he who "hath committed iniquity shall not have equity;" but this rule has never applied to a situation where a person in good faith, in a peaceable manner, under claim of right, and with no litigation pending has taken some action in reference to property he deemed his own.
3. Where the cost of replacing the spur track was about $2,300, which would be wasted if it should be finally determined that the railroad company was acting within its rights, and where damages will adequately compensate the shipper who used the track, a temporary injunction against an order of the railroad commission requiring the restoration of the spur track should be granted.

[4. Whether railroads may remove spur tracks constructed at their expense without applying to the railroad commission, not decided.]

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The appeal is from an order refusing a temporary injunction restraining the enforcement of an order of the *Railroad Commission* ordering the restoration of a spur track.

The track in question was built in 1883 by the plaintiff companies at their own expense to serve the *Thompson Plow & Engine Company* of Beloit, Wisconsin. Leaving the main

track, it passed along the edge of the Rock river through the property of the Beloit Iron Works, curved around the south end of the machine shop of that company, passed over a tail race and then to the mainland, where it ended on the property now owned by the Thompson estate, lessor of the defendant *Thompson Plow & Engine Company.* During the last few years the former extensive business of the *Plow & Engine Company* has much decreased, the few shipments which it made being of less than carload lots and not in cars placed on this track.

The Beloit Iron Works increased its business substantially, found it necessary to extend its shops, and in doing so built an addition over the track in question, doors being placed on each side of the shop to allow passage of engines and cars.

The track was removed before 8 o'clock in the morning and the bridge before noon, the crew having begun work at 5:30 a. m. instead of the usual hour, 7:30 or 8 o'clock. The stated reasons for its taking up were the lack of necessity for further maintenance, the debilitated condition of the track and bridge, and the request of the Beloit Iron Works.

Informal complaint was made to the *Railroad Commission,* and on September 12th a hearing was had on an order to show cause why the track should not be restored. On September 26th the *Railroad Commission,* having found, in substance, that the spur track was a part of the *Chicago & Northwestern* system; that it should be operated for the benefit of shippers; that shippers were entitled to service thereon, and that in order that service may be rendered it would be necessary to restore the track, and that the removal was unjustified, ordered the track to be restored within twenty days.

The plaintiff companies sought a temporary injunction restraining the enforcement of this order on the ground that the only power possessed by the *Railroad Commission* to require construction and operation of spur tracks is that con-

ferred by sec. 1797—11*m*, Stats., and that the proceeding before the *Commission* in this instance was not had pursuant to the provisions of this statute, and that the order was not based upon or entered in compliance with the statute.

The *Railroad Commission* made its order on the theory that a railroad company, having constructed a spur track, may not, in the absence of some statutory provision covering the case, thereafter discontinue it.

The trial judge refused to grant the injunction on the ground that plaintiffs were not entitled to the assistance of a court of equity, since their acts in removing the track at an early hour and without giving notice were not in conformity with equitable conduct.

For the appellants there was a brief by *F. W. Sargent* and *R. N. Van Doren,* both of Chicago, attorneys for the *Chicago & Northwestern Railway Company,* and by *H. H. Field* and *J. N. Davis* of Chicago and *Sanborn, Blake & Aberg* of Madison, attorneys for the *Chicago, Milwaukee & St. Paul Railway Company;* and the cause was argued orally by *Mr. Van Doren* and by *Mr. John B. Sanborn* of Madison.

For the respondents there was a brief by the *Attorney General* and *Ralph M. Hoyt,* deputy attorney general, attorneys for the *Railroad Commission,* and oral argument by *Mr. Hoyt.*

The cause was also argued orally by *Mr. Alfred T. Rogers* of Madison, attorney for the *Thompson Plow & Engine Company.*

JONES, J. Although the trial court filed no written decision, it is conceded that the order appealed from was based on the conclusion that plaintiffs did not come before the court with clean hands. Our opinion will be confined to this question, and any other subjects will be discussed only so far as they seem to us to have a bearing upon it.

Counsel for plaintiffs evidently do not expect at this time a decision on the merits of the principal issue involved in this

action and the defendants expressly object to such a decision at this time.

The ground for claiming that plaintiffs' conduct was too inequitable to allow them to have relief in a court of equity is thus summed up in respondents' brief:

"For the express purpose of avoiding a test of its legal rights in the circuit court for Rock county, it removed the track with the greatest haste and at an hour of the day when the persons interested in keeping the track in place would have no opportunity to know of the work or to enlist the aid of the court in time if they did learn of it; and the admitted object of this extraordinary proceeding was to aid the 'development' of one particular industry regardless of its effect upon another one."

Defendants' counsel have ably argued that under secs. 1797—2, 1797—3, 1797—9*c*, and 1797—12, Stats., the *Railroad Commission* had the jurisdiction to require service on the spur track in question and that this included the right to compel the plaintiffs to restore the tracks. In other words, it is the claim that since the passage of the railroad commission act railroads have no right to remove any spur tracks without the consent of the *Commission.*

Counsel for plaintiffs refer to several decisions of the *Railroad Commission* which they claim declare that the *Commission* has no jurisdiction to make an order requiring railroad companies to continue to maintain spur tracks built at their own expense or to compel their restoration when taken up. In the case of *Doyle v. M., St. P. & S. S. M. R. Co.* the *Commission* said:

"In the present case the *Commission* is without jurisdiction to order the restoration of the sidetrack as prayed for. The track was installed before the passage of the railroad commission law and was not paid for in full by the owners of the industry to which it was originally built, nor in part by the petitioner or her predecessors. Its removal is, therefore, not subject to the conditions imposed by sec. 1802 of the Statutes, which provides for the building of spur tracks at

the expense of the industry desiring them and for the removal only upon due notice and for good cause shown. If the petitioner desires to have a new spur track constructed to serve her potato warehouse and is willing to bear the cost of building the same, the petition should be filed with the *Commission* under sec. 1797—11*m* of the Statutes. In such a proceeding the *Commission* is empowered to order the construction of such a sidetrack if the location of the warehouse is within three miles of the company's line, if the connection is necessary for the warehouse or industry in question and if it is not unreasonably dangerous to public travel." 13 Wis. R. R. Comm. Rep. 620, 622.

Appellants' counsel also cite *Osceola M. & E. Co. v. M., St. P. & S. S. M. R. Co.* 15 Wis. R. R. Comm. Rep. 416, in which the *Commission* again held that it was without power to compel the railroad company to construct a spur or sidetrack, which had been removed, to a warehouse. There are two earlier cases from which it might be inferred that at one time the *Commission* had entertained a different view. *Rib River L. Co. v. Upham Mfg. Co.* 1 Wis. R. R. Comm. Rep. 739; *Hickerson R. M. Co. v. N. P. R. Co.* 4 Wis. R. R. Comm. Rep. 395.

Counsel for plaintiffs strongly rely on *Bartlett v. C. & N. W. R. Co.* 96 Wis. 335, 71 N. W. 598, decided in 1897. In that case it did not appear who had built the spur track which had been removed by the railroad company, but the shipper had expended money in its maintenance and repair. In construing sec. 1802, which provided that owners of warehouses, elevators, and mills might at their own expense construct and maintain sidetracks and connect with railroads, in a decision by Mr. Justice NEWMAN, it was held that there was no duty on the part of the railroads to continue them, and that when the spur track was constructed by the company it had the right to remove it. Since that decision the statute has been so amended that when the spur is built by the owner, six months' notice of removal by the company must be given.

Sec. 1831*a*, enacted in 1883, makes provision for building spur tracks by railroad companies, and gives them power to condemn land for that purpose, but contains no provision or restriction as to their removal or abandonment. Sec. 1797—11*m*, enacted in 1907, gives to the *Railroad Commission* the power to require the construction of spur tracks by railroad companies under proper conditions and at the expense of shippers, and makes elaborate provision for securing such payment to the railroads. None of these three specific statutes relating to spur tracks in terms requires the railroads to continue to maintain spur tracks built at their own expense. It is urged, however, by counsel for defendants that the general terms of the railroad commission act, already mentioned, requiring every railroad to furnish adequate service and giving the *Commission* power to compel it, are broad enough to vest in the *Commission* the power to compel such continued maintenance whether the spur is built at the expense of the railroad or not.

In the case at bar the time came when the railroad company concluded that the small amount of business in carload lots furnished by defendants did not justify the expense of continuing the spur and incurring the considerable expense necessary to repair and keep it in a safe condition. They were no doubt influenced in part by the fact that such continuance would be a serious inconvenience to another shipper, not a competitor, through whose land the track passed.

It is the claim of the plaintiffs' counsel that, according to the decisions of the *Railroad Commission* and this court, the *Commission* had no jurisdiction to compel the maintenance of the spur or to compel its restoration; that according to these decisions they had the absolute right to remove the spur without notice to any one whatever; that they were not bound to anticipate that the rulings of the *Commission* or this court would be changed; and therefore it should not have been assumed by the trial court that they acted fraudulently or unconscionably.

It is one of the ancient maxims of equity jurisprudence that he who comes into equity must come with clean hands. The principle was acted upon in the high court of chancery in England at least as early as 1682, nearly 240 years ago. *Mildmay v. Mildmay,* 1 Vernon, 52. Sometimes the maxim has taken this form: "He that hath committed iniquity shall not have equity." Francis, Maxims of Equity, 7.

The rule has been thus recognized for centuries that a court of equity will not interfere on behalf of a plaintiff whose own conduct in connection with the same matter in litigation has been fraudulent, dishonest, unconscionable, or in bad faith. It is a wholesome rule, the value of which we fully recognize, and the force of which should not be relaxed. We find its most common application in actions for specific performance where the plaintiff has practiced fraud in securing the agreement; or in other cases where the relief sought by the plaintiff is inseparably connected with his own prior fraud; or in cases where an illegal contract has been made and one of the parties to it seeks its enforcement. Although its application is not confined to these classes of cases, if the words "clean hands" were given their popular meaning few corporations of long life could find relief in equity, and many, perhaps most, individual suitors would also find the door closed.

The maxim under discussion is not without its limitations, and is not to be applied arbitrarily or contrary to settled rules of equity jurisprudence. When plaintiffs removed the spur no litigation or proceeding relating to the subject was pending. They removed their own property in a peaceful manner, claiming they had the perfect legal right to do so, and basing their claim on decisions of the *Railroad Commission* and this court. If the companies had the absolute legal right to take up the spur, no one would claim that to do so at any hour of the day was fraudulent or unconscionable conduct. We think the same would be true if in good faith they believed that they had such right. We are reinforced

in this view by the fact that for hundreds of years parties have thus often taken control of property they deemed their own, though expecting some objection might be made, and nevertheless no case has been cited and we have found none where the clean-hands doctrine has been applied to deny them equitable relief. Defendants' counsel urge that the expeditious haste with which plaintiffs removed the track shows that they had not confidence in their claim of right. This does not necessarily follow. Parties may have confidence in such claims of right and yet take peaceable and legal action to avoid litigation, annoyance, or delay.

It is also urged that bad motives are to be inferred from the fact that one of the reasons for the removal of the track was the accommodation of the Beloit Iron Works. If, as they claim, plaintiffs were acting strictly within their rights, the reasons for their conduct become quite immaterial. A somewhat similar argument was used in the case of *Chippewa B. Co. v. Durand,* 122 Wis. 85, 99 N. W. 603, and was overruled.

Although there are innumerable cases denying suitors relief in equity because of their fraudulent or unconscionable conduct, they seem to be, so far as we have found, almost without exception, cases where the relief was denied on the final hearing and not on preliminary motions.

The order appealed from is a preliminary order denying a temporary injunction which sought to preserve the *status quo* until final hearing. The rule which has come to prevail in this state is well stated in *De Pauw v. Oxley,* 122 Wis. 656, at p. 659 (100 N. W. 1028), as follows:

"Where the complaint states a cause of action and the motion papers disclose a reasonable probability of the plaintiff's ultimate success, it is well nigh an imperative duty of the court to preserve the *status quo* by temporary injunction, if its disturbance *pendente lite* will render futile in considerable degree the judgment sought, or cause serious and irreparable injury to one party; especially if injury to the other is slight, or of character easily compensable in money; and that the

discretion vested in the court is largely over the question of terms of the restraint and the protection of rights by bonds from one party to the other."

It was estimated that the cost of repairing the track and bridge would range from $2,300 to $2,400. If the track were restored and if it should finally be determined that plaintiffs were within their rights, much of this expense would be wasted. One of the reasons for removing the track was its debilitated condition. If the order of the *Commission* were complied with, new material would be necessary, and this reason for removal would be nullified as an issue in the case.

The testimony shows that the damage of the *Plow Company*, if the *status quo* were preserved until the trial, would be slight and would be covered by such bond or undertaking as would be required by the court.

It seems probable that the trial court would have granted the temporary injunction except for the reason we have discussed. We do not concur in the view of the court that plaintiffs should be denied relief on the ground on which the decision was based. Since the denial of the temporary injunction during the pendency of the litigation would cause irreparable injury to plaintiffs and no damage to defendants, we consider that the *status quo* should be preserved until the trial. The question whether under existing statutes railroads may remove spur tracks built at their own expense without applying to the *Railroad Commission* is one of great importance both to the railroads and to the public and should be determined on its merits free from extraneous circumstances. On that subject we express no opinion, and nothing in this decision is to be construed as indicating any views we may entertain respecting it.

By the Court.—The order appealed from is reversed, and the cause is remanded with direction to grant the temporary injunction.

On January 10, 1922, the following opinion was filed:

PER CURIAM. It is ordered that the mandate in this action be amended in such manner as to read as follows:

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to grant the temporary injunction, and it is ordered that costs be taxed in favor of plaintiffs in this court against the *Thompson Plow & Engine Company.*

CASES DETERMINED

AT THE

January Term, 1922.

FARMERS' CO-OPERATIVE PACKING COMPANY OF LA CROSSE, Respondent, vs. BOYD and others, Appellants.

June 3, 1921—January 10, 1922.

Fraud: Sale of packing plant to co-operative association: Representations as to value: Duty of purchaser to investigate: Degree of diligence required: Special verdict: Omitted issues: Disposition of case.

1. In an action for damages sustained by reason of an alleged conspiracy on the part of the defendants in selling a packing plant to a co-operative association, the evidence (set out in the opinion) is considered not to establish a cause of action.
2. Where the value of property is largely a matter of judgment, puffing of the value by the vendor does not make him legally liable where the purchaser has an opportunity to examine the subject of the sale.
3. Where the attention of the trial court was properly called to an issue tendered by the pleadings and such issue was not submitted to the jury, it can make no finding thereon either by virtue of sec. 2858*m*, Stats., or otherwise, and the judgment rendered cannot be sustained by a presumption that findings supporting it were made.
4. Under such circumstances, where the facts are undisputed or it is clear that only one proper conclusion thereon can be reached by reasonable men, the appellate court will determine the issue; but where the evidence as to the issue is conflicting or susceptible of different conclusions, the case will be reversed, and remanded with directions to submit the issue to the jury.
5. A statement of an agent of a packing plant that it would prove profitable in the hands of the purchaser was an expression of mere opinion as to future success and could not form a basis of misrepresentation.
6. Where the question of value becomes a subject of discussion between buyer and seller, the buyer is under a duty to investigate where it can be conveniently done.

7. Where plaintiff was engaged in the business of buying a packing plant, it must exercise the ordinary and reasonable diligence of a buyer and had no right to rely upon representations of value made by interested parties.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Action to recover damages sustained by plaintiff by reason of its purchase of the Langdon-Boyd Packing Company's plant situated at La Crosse, Wisconsin, at an exorbitant price, being induced thereto by an alleged fraudulent conspiracy on the part of the defendants. The defendants named in the complaint were Andrew Boyd, *Isabella Boyd,* Langdon-Boyd Packing Company, a corporation, *George W. Burton, Frank P. Hixon, Joseph B. Funke, Carl F. Michel,* Henry Gund, F. A. S. Price, *Ira M. Chryst,* R. A. Hall, and the *National Bank of La Crosse,* a corporation.

The defendants Andrew Boyd, Langdon-Boyd Packing Company, F. A. S. Price, and R. A. Hall were not served and made no appearance.

The jury by a special verdict found that (1) the defendants *Isabella Boyd, George W. Burton, Frank P. Hixon, J. B. Funke, Carl F. Michel,* Andrew Boyd, *Ira M. Chryst,* F. A. S. Price, R. A. Hall, and the *National Bank of La Crosse* joined and co-operated with Andrew Boyd in a conspiracy to promote the organization of the plaintiff *Farmers' Co-operative Packing Company* with the purpose and intent to cause the Langdon-Boyd Company to be sold to said plaintiff corporation when formed, at the price and in accordance with the terms of the proposition dated April 14, 1913, described as Exhibit 10 in this case; that they, by means of false representations, concealments, or deceits with respect to the value of the assets of the business, prosperity, and good will of the Langdon-Boyd Packing Company or the persons interested in such proposition, induced the purchase and acquirement of said plant and property by the plaintiff corporation; (2) the fair market value of the build-

ings, machinery, and real estate of the Langdon-Boyd Packing Company acquired by the plaintiff corporation on the 13th day of June, 1914, was $57,200; and (3) the amount paid out of the corporate treasury of the plaintiff corporation as commission for the sale of its stock under the contract made between Andrew Boyd and F. A. S. Price was $34,497.94.

It appeared that the purchase price of the Langdon-Boyd packing plant, exclusive of stock and accounts receivable, was $122,914.36, and the court rendered judgment for plaintiff for the difference between such purchase price and the market value of the plant as found by the jury plus the $34,497.94 paid as a commission to Mr. Price, in all for the sum of $101,129.95 damages and costs.

From such judgment the defendants *Isabella Boyd, George W. Burton, Frank P. Hixon, J. B. Funke, C. F. Michel, Ira M. Chryst,* and the *National Bank of La Crosse* appealed.

The defendant Henry Gund was found not to have participated in the conspiracy. The defendant *Burton* was president of the *National Bank of La Crosse* and the defendants *Hixon, Funke,* and *Michel* were directors thereof. *Burton* and the bank owned preferred stock in the Langdon-Boyd Packing Company, hereinafter called the Packing Company. It was organized in 1907 with a capital stock of $100,000 common and $50,000 preferred, all of the par value of $100 per share. Only about $34,000 of the preferred stock was issued. The common stock was issued as follows: Andrew Boyd, 600 shares; Ann Langdon, 700 shares; John E. Langdon, 100 shares; *Isabella Boyd,* 100 shares. The stock was issued in consideration of the conveyance to the corporation of the assets of the Langdon-Boyd Company partnership which had theretofore existed, and which were valued at the sum of $100,000. The Packing Company continued to operate from its creation till the sale to plaintiff on June 13, 1914. It was a heavy borrower from the bank, its indebtedness ranging from $26,000 in

1907 to about $55,000 in March, 1914, but it was always granted the line of credit it required. Annual statements of assets and liabilities were rendered to the bank and they always showed a surplus on hand, though there was a net loss in 1911 of $635.68. The assets of the company exclusive of treasury stock ranged from $163,819.18 in 1907 to $207,728.95 in 1912, according to such statements. There is evidence tending to show that the financial condition of the Packing Company was considerably less favorable. It is a fair inference from all the evidence that the years mentioned had not been prosperous ones for the plant.

In 1902 the American Society of Equity was incorporated under the laws of the state of Indiana with, among other objects, that of promoting the formation of co-operative trading companies to be organized for the purpose of distributing farm products and the necessities of life. As a corporation it could not operate a trading company or plant and this became known to Boyd before the sale was made. It had a branch in this state known as the Wisconsin Union of the American Society of Equity. It was not a separate corporation, but was chartered by the American Society of Equity and had the same objects as the latter. In 1913-14 it had from ten to fifteen thousand members, and its affairs were managed by an executive board consisting of the president, vice-president, and a board of directors. Its president was D. O. Mahoney, vice-president J. H. Carnahan, secretary M. Wesley Tubbs, and its board of directors were J. H. Carnahan, W. M. Rowe, and C. E. Hanson. During the same time *Ira M. J. Chryst* of St. Croix county was president of the American Society of Equity.

J. H. Carnahan was also state organizer of the Wisconsin Union, and chairman of its packing-plant committee and of the same committee of the American Society of Equity. He had been chairman of the Wisconsin Union since 1908. In 1909 that committee visited and inspected the Abattoir Packing plant of La Crosse and also inspected the Packing Com-

pany plant and spoke with Andrew Boyd about the future of co-operative packing plants. Boyd expressed himself as skeptical in the matter.

In 1912 Carnahan again visited the Packing Company plant, and as a result of a conference with Boyd the latter stated that he might consider a proposition to sell his plant to the Society of Equity, and he was invited to appear before the executive board of the Wisconsin Union to be held at Madison in March, 1913. Boyd attended the meeting and made an oral offer to sell the Packing Company plant, whereupon the board took the following action:

"Motion by Mr. Christman that a committee be appointed by the president to investigate the Langdon-Boyd packing plant at La Crosse, and, if deemed advisable, to work out a plan to take over said plant and arrange for financing same. Seconded by Mr. Emerton. Carried. Chair appointed Mr. Christman, Mr. Carnahan, and Mr. Davidson. Motion made by Mr. Carnahan that in case Mr. Davidson cannot serve upon this committee it is the sense of this committee that D. O. Mahoney be the other member of such committee. Seconded by Mr. Christman. Carried."

Thereafter the committee thus appointed visited the Packing Company and with the exception of Mahoney spent a whole day examining the plant. After such examination Boyd was requested to submit a proposition for the sale of the plant in writing which he did under date of April 14, 1913, as follows (being Exhibit 10):

"A. H. Christman,
"Menomonie Falls, Wisconsin.

"Dear Sir: After giving careful consideration to the question of selling our plant and business to the Wisconsin Society of Equity and talking same over with the other common stockholders, I have decided it would probably be to the mutual advantage of myself and your company to do so. The possibilities in the increased business here and of starting other plants when this one shows the advantage of such arrangement, is the incentive for this decision. We

will sell and transfer the property of our company under the following conditions:

"Real estate, which includes the ground upon which the plant is now situated, the lots across the street and opposite the plant, and one lot in the resident part of the city, for $30,200; all machinery and plant at the book value of $97,771.37 less depreciation $5,057.01, $92,714.36; live stock, stock in trade, merchandise, horses, wagons, tools, and implements to be fixed by inventory at time of transfer, book accounts at face value, the same to be guaranteed by common stockholders of the Langdon-Boyd Packing Company. The good will of our company I consider of value, as if you wish to start a new company it would take an investment of about a year to get the plant built and in operation and another year or more to perfect a cure, get trade established, and a reputation on your goods, which would mean a loss of interest on the amount invested for two years at least, and this would amount to $25,000 or $30,000. Our plant is a going concern, and the day after transfer is made will be making money on the investment.

"I will state in this connection that it is mutually agreed by the common stockholders of the present company that if this inventory and transfer should more than equal the par value of the common and preferred stock, together with the indebtedness outstanding at time of transfer, that they would agree to accept such par value and indebtedness in full payment.

"I would suggest that a meeting of your executive board be called at once in Madison, and I will come to such meeting and, if all is agreeable, to start immediate and active arrangements for incorporating the new company and placing stock.

"Kindly let me hear from you at once in regard to this, as after making this decision I am anxious to see the new company in active operation.

"Yours truly,
"ANDREW BOYD."

"P. S. Unanimous consent of all stockholders is necessary to sell and transfer a going stock company, but I have no doubt but that I can secure such consent."

At the next meeting of the executive board, which was

held at Madison June 6 and 7, 1913, Boyd's proposition was submitted and it was resolved that, inasmuch as the board considered it favorably, a committee be appointed to solicit stock for the same. A committee of six was appointed, one of whom could not serve, so Carnahan appointed Andrew Boyd a member, he having shortly before joined the union. A letter was sent to each member by the secretary stating that no compensation was provided for, but that if the deal took tangible form a commission would be allowed on all stock sold, to be charged up to promotional expense. The next meeting of the executive board was held at Milwaukee on the State Fair grounds September 10, 1913, at which time the first subscriptions for stock were taken and where Boyd first met *Ira M. J. Chryst,* who was then the president of the American Society of Equity. He refused to subscribe for stock until he had looked into the matter further, and later in November at St. Paul *Chryst* told Carnahan that he would assist if they would incorporate the new company under the Wisconsin Co-operative Association Law. Later he visited the Packing Company plant and spent about half a day examining it and expressed himself satisfied. From then on he became an active promoter of the plaintiff company, addressing meetings and selling stock.

At the Milwaukee meeting the board received and accepted an invitation to hold the next annual convention of the society at La Crosse. This was held on December 3, 4, and 5, 1913, and was attended by over 400 members, it being generally known that the question of purchasing the Packing Company plant would come up for action.

The convention was addressed by a number of men, among others the mayor of La Crosse, the secretary of the board of trade, the governor of the state, the president of the Wisconsin Union, and almost all of them mentioned the prospective purchase of the Packing Company plant as a desirable thing and worthy of consideration.

A committee consisting of J. H. Carnahan, M. P. Laurson, *Ira M. J. Chryst,* A. O. Wangen, James Allison, Frank Wilde, and Ben Lang was appointed to make an inspection of the plant and report and members generally were invited to visit it, and many did so. After the committee had inspected the plant it made this report:

"We, your committee on co-operative packing plant, beg leave to report as follows:

"We unanimously recommend the establishment of a co-operative packing plant under the co-operative laws of 1911. We further report that we, your committee, have inspected the Langdon-Boyd packing plant of La Crosse, which was inspected and recommended by your state board at the board meeting in July, 1913, and we recommend that this convention take such action as will lead to the completion of the purchase proposition as submitted by Mr. Boyd to our executive board of the Wisconsin State Union at their board meeting held in Milwaukee in September, 1913."

The written proposition of Andrew Boyd was read to the convention at the request of a delegate and after discussion the report of the committee was unanimously adopted. At the last session of the convention, nothing further having been done, upon motion of Mr. Carnahan the packing-plant proposition was referred to the committee on department unions to report to the convention, and that they get the stockholders together to organize the department of the packing-plant proposition. The committee on department unions consisted of *Ira M. J. Chryst,* Jens Davidson, and H. E. Holmes. It met in the evening and decided that the same committee that had been handling the packing-plant proposition should continue with it.

A vigorous subscription campaign followed, chiefly under the direction of defendant F. A. S. Price of Chicago, who was hired by Boyd in early March, 1914, to have entire charge of the selling of stock in the new corporation, which was to be known as the *Farmers' Co-operative Packing Com-*

pany of La Crosse, with a capital stock of $250,000. The form used for the subscription of substantially all of the first $100,000 of stock was as follows:

"*Farmers Co-operative Packing Company of La Crosse, Wisconsin*—Authorized capital $250,000.

"I hereby subscribe for ——— shares of the capital stock of the *Farmers Co-operative Packing Company,* and agree to pay one hundred ($100) dollars per share for same as soon as the amount of stock necessary to organize the corporation has been subscribed, it being understood that the *Farmers Co-operative Packing Company* will, when organized, take over the plant, assets, and business of the Langdon-Boyd Packing Company of La Crosse, Wisconsin, upon the terms proposed to and accepted by the executive board of the Wisconsin State Union of the American Society of Equity and ratified by the Wisconsin state convention of said union at La Crosse, Wisconsin, December 3 to 5, 1913."

A committee appointed by the La Crosse board of trade to solicit subscriptions declined to do so because some of the members thought the price asked was too high, and defendants Boyd and *Burton* were so informed. *Burton* asked if it was necessary that the committee report. It never did make a report.

At Boyd's request made to *Burton* three of the defendants, *Hixon, Funke,* and *Michel,* subscribed for ten shares each in the new company, in reality on behalf of the bank, which turned in a part of its preferred stock in the Packing Company in payment. Later, April 4th, *Burton,* and April 30th Gund, subscribed for ten shares of stock each. The fact that these business men as well as many others not connected with this case subscribed for stock was widely advertised in the La Crosse papers, and there was some evidence from subscribers of stock to the effect that they relied upon the good business judgment of these men in making their subscriptions, but others said they did not.

In April, 1914, *Chryst* was informed that sufficient stock had been subscribed to authorize the incorporation of the

new company. The articles of incorporation were formulated by Tank, secretary of the American Society of Equity, Price, and *Chryst* from a rough draft prepared by Mr. Price, and as adopted provided for an authorized capital stock of $250,000; that no stockholder could hold more than $1,000 of stock or be entitled to more than one vote. The incorporation was under the provisions of secs. 1786*e*—1 to 1786*e*—17 of our Statutes, and the articles were executed April 27, 1914, by Joseph H. Carnahan, *Ira M. J. Chryst,* Henry Garbers, Dell H. Baker, and H. G. Tank.

May 4, 1914, an organization meeting was held at La Crosse, attended by several hundred subscribers of stock, at which the articles of incorporation were adopted and the stock subscriptions accepted. The first stockholders' meeting was held immediately after the adjournment of the organization meeting and was attended by a like number of subscribers of stock. At such meeting directors were elected, eighteen in all. The same evening the first directors' meeting was held and the following officers elected: *Ira M. J. Chryst* president; Andrew Boyd first vice-president; J. H. Carnahan second vice-president; F. A. S. Price third vice-president; O. J. Sorenson fourth vice-president; A. O. Wangen fifth vice-president, and A. W. Johnson secretary and treasurer. Boyd was also unanimously elected general manager at a salary of $2,500 per year.

At this meeting the proposition for the sale of the Packing Company plant as contained in Exhibit 10 was then presented to the meeting. Brown, one of the directors, expressed the view that the price was high and that an appraisal be had. Boyd said he was willing that his plant be appraised by an appraisal company and turned over to the new company at the appraised value whether higher or lower than his offer. Tank, who was present, suggested that a motion be made to accept a new appraisal and pay the price shown by it, but none was made. Instead, Boyd's original proposition was accepted unanimously, and it was

ordered that, as soon as $100,000 had been paid in, a special meeting of the board be called for the purpose of making the transfer of the property.

Upon the suggestion of Mr. Tank the executive committee, which had power to act when the board of directors was not in session, was increased from five to seven members because Boyd as general manager, and Johnson who worked under him and was secretary and treasurer, were *ex officio* members of such committee, Tank calling attention to Boyd's interest in making the sale.

In view of the remarks of Mr. Brown as to the price and of Mr. Tank as to Boyd's desire to sell, Boyd tendered his resignation the next day as vice-president and general manager, sending a copy thereof to each director and officer, but at the June 13th meeting the board of directors unanimously refused to accept the resignation. Such meeting was the second meeting of the board of directors and lasted from 10:40 a. m. to late in the afternoon. Owing to more subscriptions having been secured, ten additional directors were chosen, one of whom was present and one old director absent, leaving eighteen directors in attendance. Early in the afternoon a motion was made to reconsider the motion of May 4th accepting the Boyd proposition and it was carried by a vote of 12 to 6. And by a vote of 11 to 7 the action accepting the Boyd proposition was rescinded. A discussion then ensued as to the value of the plant, some being in favor of a new appraisal. Boyd repeated his offer made May 4th as to a new appraisal. The directors had before them appraisal reports made by F. R. Schwalbe, John A. Miller, and Ori J. Sorenson, all contractors and builders of good standing in La Crosse, as to buildings, and as to land by S. W. Anderson and Frank G. Roth, both engaged in the real-estate business in La Crosse, and as to machinery by A. A. Schneider, an engineer in the employ of the John Gund Brewing Company. The adoption of these reports was carried by a vote of 10 to 4. It was then moved and seconded

that the purchase proposition as accepted May 4th be accepted and that the officers of the company be instructed to make the transfer at once. Before the motion was put, Director Bosshard from La Crosse tendered his resignation and left the meeting. The motion passed with one vote of Director Wolfe against it and Director Garbers not voting.

The transfer took place June 13, 1914, and payments upon the purchase price were made from time to time as late as December, 1914, and the plaintiff continued to operate the plant from the time it took possession until the early part of 1917. Andrew Boyd resigned as general manager in August, 1915, and from then on D. H. Baker, who had before been superintendent of the plant, managed the affairs of the company until the early part of 1917, when it closed down. Since then no effort has been made to operate the plant, but several unsuccessful efforts to get a quorum of stockholders for the purpose of re-financing it were made before this suit was begun, which was in the fall of 1919.

For the appellants there were briefs by *George H. Gordon, Law & Gordon* of La Crosse and *Harry L. Butler* of Madison, and oral argument by *Mr. George H. Gordon* and *Mr. Butler.*

Jesse E. Higbee of La Crosse, *C. W. Graves* of Viroqua, and *R. B. Graves* of Sparta, for the respondent.

The following opinion was filed November 15, 1921:

VINJE, J. The foregoing statement of facts is an outline statement only and does not purport to embody detailed facts. It does, however, contain the main facts around which the evidentiary facts cluster. The complaint alleged a fraudulent conspiracy and the proof properly took a wide range, perhaps in a number of instances on behalf of plaintiff wider than the rules of evidence permit even in such cases. It is therefore not practical in a judicial opinion to set forth the detailed evidence, especially in a case such as this, where the controlling questions passed upon by the court below are

questions of fact whose correct solution is of little value to the legal profession. But it does not follow from this that all the evidence has not received careful consideration. The importance of the case, in view of the amount involved and the stigma cast by the verdict upon the reputations of prominent business men and farmers of the state, has served to emphasize judicial duty, though it is hoped such added emphasis is not necessary in any case. In addition to the importance of the case, the very exhaustive and earnest briefs and oral arguments of counsel on both sides not only incited but materially assisted judicial inquiry.

A careful study of the case has been made by each member of the court with the result that it is its best judgment that no cause of action exists in favor of plaintiff against the appealing defendants or against any of them.

It is the settled law of both England and America that a buyer is required to notice such qualities of the goods purchased as are reasonably within his observation, and this is especially true as to value, which is largely a matter of judgment, and hence though value be puffed by the vendor such puffing does not render him legally liable where the purchaser has an opportunity to examine the subject of the sale. 2 Kent, Comm. (14th ed.) 478; Story, Sales (3d ed.) § 348; 1 Bouv. Law Dict. 438.

It will be noticed that the special verdict did not submit to the jury the issue as to whether or not plaintiff in fact relied upon the representations made by the defendants or whether it was justified in relying upon them, though such issue was tendered by the pleadings and was requested by the defendants to be submitted to the jury. Where the trial court's attention is properly called to an issue and it is not submitted to the jury it can make no finding thereon either by virtue of sec. 2858*m*, Stats., or otherwise, and the judgment rendered cannot be sustained by the presumption that findings supporting the judgment were made. *Habhegger v. King,* 149 Wis. 1, 135 N. W. 166; *Murray v. Paine L. Co.*

155 Wis. 409, 144 N. W. 982. Such assumed findings can support the judgment only in cases where the attention of the trial court has not been called to the issue. Sec. 2858*m*, Stats.

In cases where the evidence as to the issue thus omitted is conflicting or susceptible of different conclusions, the case will be reversed and remanded with directions to submit such issue to the jury. But where the facts are undisputed, or it is clear that only one proper conclusion thereon can be reached by reasonable men, this court will determine such issue and dispose of the case accordingly.

It is our conclusion that the question whether the plaintiff had a right to rely upon the representations made by the defendants as to the value of the plant must be answered in the negative upon practically undisputed testimony.

It appears that at the directors' meeting of May 4, 1914, one of the directors, Mr. Brown, expressed the view that the price asked was too high and that an appraisal be had. Mr. Boyd consented to a new appraisal provided the price fixed by the appraisers should be the purchase price. The directors did not desire an appraisal but voted unanimously to accept Boyd's written proposition. At the June meeting when the plant was finally bought, the question of price became a subject of such heated debate that one of the directors, Mr. Bosshard, resigned and left the meeting. The same offer as to an appraisal was again made by Boyd but rejected. The directors had before them the appraisals mentioned in the statement of facts; they had the report of a number of committees who had previously examined the plant, but above all they had the plant before them; that is, it was near by, open to their inspection, and a number of them had inspected it. Under such circumstances they had no right to rely upon the written offer as to value. It is claimed, but not proven, that the book value given in Exhibit 10 was too great. Concede that it was. The plant was there, had been inspected, and no claim is made that Boyd

did not invite inspection or that he sought to conceal or misrepresent the condition of any corporate part of the plant. His view that it would prove profitable in the hands of plaintiff was the expression of a mere opinion as to future success and could not form the basis of a misrepresentation. The law is well settled that where the question of value becomes a subject of discussion between buyer and seller, the duty to investigate follows where an investigation can conveniently be had. In *O'Day v. Meyers,* 147 Wis. 549, 554, 133 N. W. 605, the rule is thus stated:

"It is elementary that mere representations as to value, where the purchaser is presumed competent to judge thereof and has full opportunity to, and does, examine the property to be purchased, do not constitute false representations entitling the purchaser to rescind on that ground, even though relied upon by him. Such representations as to value constitute nothing more than the mere opinion of the seller," citing a large number of Wisconsin cases. See, also, *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231; *Morgan v. Hodge,* 145 Wis. 143, 129 N. W. 1083; *Miranovitz v. Gee,* 163 Wis. 246, 157 N. W. 790; *Karls v. Drake,* 168 Wis. 372, 170 N. W. 248; *Swoboda v. Rubin,* 169 Wis. 162, 170 N. W. 955.

In 12 Ruling Case Law, p. 361, the rule is expressed as follows:

"Where a party to whom representations are made is put upon inquiry by his knowledge of the facts and undertakes to make an investigation of his own, and the other party does nothing to prevent this investigation from being as full as the investigator chooses to make it, the investigator will not usually be heard to say that he had the right to rely on such representations."

Here the plaintiff had convenient opportunity for full examination as to condition and value of the plant. It is only where there is no opportunity for adequate examination that the purchaser may rely upon representations made. *Ohrmundt v. Spiegelhoff, ante,* p. 214, 184 N. W. 692. Thus,

much that plaintiff contends for may be true and yet legal liability on the part of the appealing defendants may not follow if it is shown that plaintiff, before making the purchase, had its attention called to the high price and had an opportunity to ascertain the truth with respect thereto but refused or neglected to do so. In such event it must abide the consequences of its voluntary act even though it be a corporation and even though its directors may have been quite ignorant of the value of packing plants. If they were ignorant it was their duty to inform themselves. Plaintiff was engaged in the business of buying such a plant and was chargeable with the duty to exercise the ordinary and reasonable diligence of a buyer. *Ohrmundt v. Spiegelhoff, ante,* p. 214, 184 N. W. 692. It thus appears that plaintiff had no right to rely upon any representations made by the defendants and that therefore it has no cause of action against them.

The opinion might well end here, for the legal ground upon which the decision of this court is based is as stated. But in view of the gravity of the charges made by plaintiff against the defendants we deem it proper to state that we are also of the view that no conspiracy was shown in which any of the answering defendants participated. In coming to such conclusion the court has not been unmindful of the weight that should be given to the verdict—especially when approved by the trial court. Nor has it ignored the fact that fraud and conspiracy is usually proved by circumstantial evidence and that it may be satisfactorily shown by a combination of circumstances none of which alone has much probative force. Our conclusion has been reached not so much because of the weakness of disputed evidentiary facts which, but for other undisputed evidence, the jury might well resolve in favor of the plaintiff, but because of the positive evidence that the organization of the plaintiff was instituted by the farmers themselves for the purpose of building or purchasing a co-operative packing plant, notwith-

standing the fact that in the early proceedings the purchase of the Packing Company became the probable objective of the organization. Such conclusion is further strengthened by the fact that plaintiff operated the plant for two years and a half and then waited another two years before beginning action. Long before it ceased to operate the plant it knew its condition at the time of purchase, yet it made no claim that it had paid too much. Boyd ceased to be connected with the plaintiff's plant in 1915, and from then on it cannot be argued that plaintiff was still in the clutch of the alleged conspiracy. That plaintiff failed to make the plant a profitable one may be due to many causes. Its loss of $60,000 worth of meat in one year, due to inadequate refrigeration, may spell poor management. Its lack of success, together with that of many other co-operative ventures, which is a matter of common knowledge, may indicate that man is not yet altruistic enough to make them financially successful. But the success or failure of plaintiff's plant has only an indirect bearing on the question whether plaintiff was induced by actionable fraud or conspiracy to pay too much for it. If it was, it is entitled to its lawful damages. If it was not, it is immaterial whether it was a success or failure.

The substance of the claim of plaintiff is this: The defendants, for the purpose of securing a grossly excessive price for the Packing Company plant whereby the owners and the creditors would be fully reimbursed for their investment, conceived the scheme of forming a co-operative corporation under the laws of Wisconsin and selling the plant to them for such grossly excessive price. As evidence of such scheme the activities of Boyd, *Chryst,* Carnahan, Mahoney, and of the appellant defendants in the creation of the plaintiff corporation is relied upon. That Boyd, *Chryst,* Carnahan, and Mahoney were active in the formation of the plaintiff corporation is well established. But of these *Chryst* is the only appellant. Mahoney and Carnahan as well as

many other members and officers of the American Society of Equity or of the Wisconsin Union thereof, who were also very active, were not even made defendants. The strongest evidence to show connection with the alleged conspiracy on the part of the bank officers is claimed to be the fact that they took stock in the plaintiff corporation in their own names when the bank was the real owner thereof; that they sold it before plaintiff became insolvent; and that they permitted a publication of their names in the La Crosse papers as subscribers of stock; also the fact that *Burton* expressed the opinion that the purchase price was a stiff one and that he thought Boyd had better sell for $60,000 if he could get no more, and that Boyd paid for the five shares of stock subscribed by *Chryst*, and the fact that the first $85,000 paid on the purchase price was paid into the bank to liquidate its indebtedness and that of preferred stockholders in the Packing Company. As further proof of a conspiracy it is shown that the subscription blank used early in the formation of the plaintiff spoke of the purchase of the Packing Company plant, that *Chryst* spoke of such purpose in a letter during the early organization proceedings. These are the main claims made showing fraud. Many others are claimed to exist, and the argument made on behalf of plaintiff is strong and persuasive, but we deem the conclusion it seeks to reach is not sustained by the evidence.

The testimony as to the value of the Packing Company took a wide range. By some witnesses it was placed less than the value found by the jury and by some as high as the price paid. It must therefore be assumed as a verity that the value found by the jury has support in the evidence and cannot be disturbed. But the very fact that there was such great difference in opinion as to value by presumably competent and disinterested witnesses has a very direct bearing upon the question of fraud, for where competent honest men may differ, fraud cannot be so unerringly inferred from a purchase made within the limits of the testimony. The apprais-

als made by the men referred to in the statement of facts, and which were adopted by plaintiff as a basis for the price, showed the plant to be worth substantially what was paid for it.

But as before stated, the basis of our decision lies in the fact that plaintiff through committees of its own had several times inspected the plant for the purpose of ascertaining its value before the second directors' meeting when the purchase was finally decided upon; that at such meeting the value of the plant became a subject of sharp controversy; that the plant was close at hand and open to inspection before purchase; that the directors, notwithstanding the fact they had their attention called to the price, the adverse interest of Boyd and Johnson, nevertheless were satisfied to go on and complete the purchase relying upon inspections already made by its committees and upon appraisals before them. Under such circumstances, in the absence of any false representations made by the defendants—and there are none except perhaps as to the book value of the plant,—plaintiff must be held to have acted upon its own judgment, and if it erred it must bear the consequences. It will not do to say that plaintiff's directors were ignorant as to the value of packing plants. They had it within their power, and it was their duty to the stockholders, to inform themselves before making a purchase. They had informed themselves and they made further investigations that day by waiting for the appraisals mentioned before acting. Boyd's offer to have a new appraisal to determine the price was twice repeated. The fact that he asked a high price for the plant, in the absence of false representations, and with full opportunity to inspect, does not constitute fraud. Neither is a creditor guilty of fraud because he knows his debtor is endeavoring to sell his property at a high price where the creditor makes no representations of his own in regard to the matter.

But it is claimed by plaintiff that the fact that the directors of the bank subscribed for stock in the plaintiff com-

pany shows a participation in the fraud, and especially the fact that they disposed of their stock at an early day.

Courts should deal with practical matters in a practical way. La Crosse was a city of about 30,000 people. A large co-operative farmers' packing plant was to be established. A drive was made for that purpose, meetings were held. Newspapers were full of the enterprise. The defendants referred to, *Burton, Hixon, Funke,* Gund, and *Michel,* were old and prominent business men of the city, which depended for its prosperity largely upon the farmers. Let one of the witnesses, not a defendant, tell why subscriptions were made by the business men of La Crosse. Mr. Doerflinger, president of the board of trade, testified as follows:

"I subscribed for $1,000 stock in that enterprise because I was solicited. Naturally, I thought it a good thing; and as president of the board of trade and as a merchant here, we are always looking for things that are going to help the town. I did believe it was going to benefit the city, because when *Mr. Chryst* was here he gave us very good explanations; told us the places where they made big successes, the organizations of that kind. I did think and believe today that if it had been well managed it would have been a good thing for the city of La Crosse; we thought that if this was well managed it would prove a big thing for La Crosse. Mr. Brayton solicited my subscription. Mr. Brayton was editor of the Tribune. This is how he solicited my subscription: The thing didn't take a start very easy, so Mr. Brayton called me up. He says: 'Mr. Doerflinger, you will have to get on this list and start the thing moving.' He says, 'You are president of the board of trade, and of course the first thing people ask, "What is Doerflinger doing; he is hollering his head off about this thing, now what is he doing?" ' Well of course, I put myself down for a thousand dollars."

Who can doubt the truth of Mr. Doerflinger's statements?

The defendants gave substantially the same reasons for their subscriptions, namely, that they thought it would be a good thing for the town; that they were expected to subscribe and did so. Later they sold their stock, but that was

when it was selling for more than par and Hall had sold more stock than he could deliver and came to *Burton* to help him out with his stock. Plaintiff's executive committee on May 4, 1914, voted that after the sale of the first $100,000 the next $50,000 should be sold at $105, and the next $50,000 at $110, and the next $50,000 at $115. The stock sold for above par the next fall, and some of the defendants resold their stock, *Burton* for the reason stated. No badge of fraud or conspiracy is perceived either in the subscription or resale of stock. Of course later, after the stock became worthless—a contingency not probable at the time of sale,—it can easily by argument be made to assume a sinister aspect. But conduct should be judged by the circumstances as they appear at the time and not by subsequent events.

As before stated, *Chryst* was president of the American Society of Equity, Carnahan was president of the Wisconsin Union and chairman of the packing-plant committee of both organizations. D. O. Mahoney was county judge of Vernon county and for six or seven years president of the Wisconsin Union of the American Society of Equity. All these men were eager for a co-operative packing plant and worked zealously for it without remuneration, except that *Chryst* received a few shares of stock from Boyd, who wanted to reimburse him in part for his time and services. That such men should betray their trust to the organization that had honored them with the highest offices at their command is not very credible; that they should do it without any substantial compensation is highly incredible. It may have been a case where their zeal outran their judgment. That often happens to the best of men. Certain it is that during the period mentioned there was great activity among the farmers in the formation of their co-operative enterprises.

That the officers of the bank should have joined in a conspiracy to defraud the farming community upon whose prosperity their bank ultimately depended does not seem plausible unless a very strong motive is shown. The motive claimed is that in that way the bank could secure the pay-

ment of the indebtedness of $55,000 which the Packing Company owed the bank. The force of this motive becomes less apparent when it is remembered that the value put upon the plant by the jury plus the other assets of the company was ample to take care of this indebtedness and practically of the whole indebtedness of the plant. There is no proof that *Isabella Boyd* said or did anything to aid the alleged conspiracy except to subscribe for some stock in the plaintiff company. She was Boyd's sister and had been his bookkeeper. The chief argument to show her guilt is based upon the fact that she did not testify at the trial though present. Her failure so to do is not of itself a sufficient basis for finding her guilty. Verdicts should rest upon more substantial grounds.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint upon the merits.

OWEN and JONES, JJ., dissent.

A motion for a rehearing was denied, with $25 costs, on January 10, 1922.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent, vs. MCGINLEY, Appellant.

September 23, 1921—January 10, 1922.

Courts: Concurrent jurisdiction of state and federal courts: Federal Employers' Liability Act: Injunction by state court against proceeding in foreign court: Differences in procedure as ground for injunction: Difficulty in presenting case: Attorneys: "Ambulance chasing."

1. Whenever Congress gives a right which by its terms is not exclusively confined to the jurisdiction of the federal courts, such right may be enforced by a state court; and the jurisdiction of the state court is concurrent with that of the federal court.

2. Under the federal Employers' Liability Act of April 22, 1908, sec. 6, as amended by the act of April 5, 1910, sec. 1, the state courts have concurrent jurisdiction with the federal courts, such act merely recognizing the prior existing jurisdiction of the state courts.
3. The federal act as amended does not prohibit a state court from regulating the conduct of its own citizens by injunction so as to prevent hardship, oppression, or fraud.
4. Equity may enjoin a citizen of this state from prosecuting an action for personal injuries against a railroad company under the federal act in the courts of another state where it is necessary to prevent hardship, oppression, or fraud.
5. The deprivation of the privilege of examining an adverse party before trial as provided by sec. 4096, Stats., does not work such hardship, oppression, or fraud as will warrant enjoining a citizen of this state from prosecuting an action under the federal act in Minnesota where there was no such privilege, both parties being on the same basis in this regard.
6. A citizen of Wisconsin will not be enjoined from prosecuting an action under the federal Employers' Liability Act in the courts of Minnesota because of the fact that in that state a verdict may be rendered by ten jurymen or because the jury will not have an opportunity to examine the premises. Under such act the injured employee may bring his action in a district wherein the railroad company is doing business.
7. A court of equity is not warranted in enjoining a citizen of this state from prosecuting in a sister state an action for personal injuries sustained in Wisconsin on the ground that a large number of the witnesses reside in this state, making necessary the taking of their depositions instead of oral testimony.
8. Nor will injunction lie because of allegations that his counsel in such other state has been guilty of unprofessional conduct, where such matter is denied generally and has not been established.

APPEAL from an order of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

The appeal is from an order perpetually restraining and enjoining the defendant from maintaining, carrying on, or prosecuting an action begun by the defendant against the plaintiff in the district court of Renville county, in the state of Minnesota, and from maintaining or prosecuting any action in any court or place outside or beyond the limits of the state of Wisconsin, for personal injuries sustained by the

defendant in the city of Janesville, Rock county, Wisconsin.

The facts are stated in the opinion.

For the appellant there was a brief by *Davis & Michel* of Minneapolis, attorneys, and *Jeffris, Mouat, Oestreich, Avery & Wood* of Janesville, of counsel; and the cause was argued orally by *Ernest A. Michel* and *L. A. Avery.*

For the respondent there was a brief by *H. J. Killilea* of Milwaukee and *Nolan & Dougherty* of Janesville, and oral argument by *Mr. Killilea.*

The following opinion was filed November 15, 1921:

DOERFLER, J. The part of the injunctional order complained of is as follows:

"It is ordered that the defendant, *Clarence S. McGinley,* his agents, attorneys, and employees, be and they are perpetually restrained and enjoined from maintaining, carrying on, or prosecuting any suit or procedure by him, now instituted in the state of Minnesota, against the *Chicago, Milwaukee & St. Paul Railway Company,* because of, or on account of, any injury sustained by said *Clarence S. McGinley* on or about the 12th day of June, 1920, at the city of Janesville, Rock county, in the state of Wisconsin, and said defendant, his agents and attorneys, are perpetually restrained and enjoined from prosecuting or assisting in the prosecution, or in any manner trying the case of *Clarence S. McGinley* against the *Chicago, Milwaukee & St. Paul Railway Company,* now pending in the district court of Renville county, in the state of Minnesota, and the said *Clarence S. McGinley,* defendant herein, is restrained and enjoined perpetually from in any manner assisting or engaging in the prosecution of said suit, so instituted in the state of Minnesota by him against the *Chicago, Milwaukee & St. Paul Railway Company,* and said *Clarence S. McGinley,* defendant herein, is restrained and perpetually enjoined from maintaining, instituting, conducting, or prosecuting any action to recover for said injury received in the city of Janesville, Rock county, Wisconsin, on or about the 12th day of June, 1920, in any court or place outside and beyond the limits of the state of Wisconsin."

The defendant, at the time he sustained the injuries herein referred to and at all times herein mentioned, was a resident of Rock county, Wisconsin, and on or about June 12, 1920, was engaged as an employee of the plaintiff as a box packer and oiler in the yards of the plaintiff company in the city of Janesville, in said Rock county, and while so employed sustained severe personal injuries. The action of the defendant is based upon the federal Employers' Liability Act of Congress.

The plaintiff, at all times referred to herein, was and is a railway corporation, chartered and existing under the laws of the state of Wisconsin.

Some time after the happening of the accident resulting in defendant's injury the defendant brought the action above referred to against the plaintiff in said Renville county, Minnesota, and such action was pending in such county at the time of the commencement of this action. The grounds for injunction set forth in the complaint are substantially as follows:

1. That the necessary and material witnesses of the plaintiff, being about fifteen in number, reside in the city of Janesville, Wisconsin.

2. That the county of Renville, Minnesota, where the defendant brought his action, is approximately 500 miles from the city of Janesville, where the accident occurred.

3. That if the action be tried in Minnesota, in said Renville county, the plaintiff cannot have its witnesses present and will be deprived of having them testify personally before a jury.

4. That the plaintiff will be deprived of the privilege of having the jury view the premises.

5. That a verdict in Minnesota may be rendered by ten concurring jurors, and that a unanimous verdict of twelve jurors is required in Wisconsin.

6. That the plaintiff, if the action is tried in Minnesota, will be deprived of the privilege of examining the defend-

ant under and pursuant to the provisions of sec. 4096 of the Statutes of Wisconsin previous to trial.

7. That the action is wrongfully brought in the state of Minnesota by the defendant for the purpose of securing an unjust advantage over the plaintiff.

8. That the expense of trying the action in Minnesota will be greater than if the cause is tried in Wisconsin.

9. That the plaintiff will be inconvenienced if the case be tried in Minnesota.

10. That the plaintiff will not receive a fair trial in the state of Minnesota.

It is further alleged in the complaint that defendant's attorneys, in the conduct of their business, maintain an office or bureau by means of which, through clippings from newspapers and various agencies, they ascertain and learn of various accidents and injuries received by railroad employees in the states of Minnesota, Wisconsin, Illinois, and Iowa, and on learning of any accident they personally or through an agent solicit such personal-injury business. In brief, the plaintiff charges the defendant's counsel with having procured the authority to prosecute the personal-injury action by and through means commonly known in the profession as "ambulance chasing."

The defendant in his answer generally denies all the allegations in the plaintiff's complaint upon which an application for an injunction is based.

The first objection of defendant's counsel is embraced in the inquiry set forth in their brief as follows:

"Can a state court, by injunction, limit the jurisdiction and venue provided in personal-injury actions under the Employers' Liability Law of Congress?"

Under the amendment of date April 5, 1910 (36 U. S. Stats. at Large, 291, ch. 143), the federal Employers' Liability Act, among other things, was amended so as to read as follows:

"Under this act an action may be brought in a circuit

court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of the commencing of such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The real question involved in this case does not embrace a limitation or control of the jurisdiction and venue provided for in the Employers' Liability Act of Congress, but does involve the right of a state court, for certain reasons, to regulate the conduct of its own citizens over whom it has jurisdiction, in such a way as to prevent hardship, oppression, or fraud.

At the time of the enactment of the original Employers' Liability Act the state courts had jurisdiction to try personal-injury actions authorized by the act. In the amendment of 1910 above set forth, no jurisdiction was conferred by the act upon state courts, and, in fact, Congress has no power under the constitution to confer or grant jurisdiction to a state court, excepting only as has been held in *Robertson v. Baldwin,* 165 U. S. 275, 17 Sup. Ct. 326, that Congress can go no farther than to authorize the judicial officers of the several states to exercise such powers in such cases as is ordinarily exercised by officers of courts not of record. The state courts exist under the constitution and laws of the state and their jurisdiction is defined thereunder. State courts may exercise jurisdiction in cases authorized by the laws of the state and not prohibited by the exclusive jurisdiction of the federal courts. By this is meant that wherever Congress gives a right which by its terms is not exclusively confined to the jurisdiction of the federal courts, such rights may be enforced by a state court, and the jurisdiction of the state court is concurrent with the jurisdiction of the federal court. *Houston v. Moore,* 5 Wheat. 1, 27;

Mondou v. N. Y., N. H. & H. R. Co. 223 U. S. 1, 32 Sup. Ct. 169 (Second Employers' Liability Cases).

In the latter case cited it was held by the court, Mr. Justice VAN DEVANTER rendering the opinion:

"The laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, paramount sovereignty. . . . If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Mr. Chief Justice TANEY in the case of *Ableman v. Booth,* 21 How. 506, 16 Lawy. Ed. 169; and hence the state courts have no power to revise the acts of the federal courts, nor the federal the state, except where the federal constitution or laws are involved. *But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied.*"

Prior to the passage of the 1910 amendment the supreme court of Connecticut held that state courts had no jurisdiction of actions brought under the federal Employers' Liability Act. *Hoxie v. N. Y., N. H. & H. R. Co.* 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324. But when the case last cited

reached the supreme court of the United States that court held that the state courts had jurisdiction under the federal act even before the amendment of 1910, and the decision of the supreme court of Connecticut was therefore overruled. So that it can be safely said that by the amendment of 1910 Congress did not confer jurisdiction upon the state courts with respect to the enforcement of rights and remedies under the federal Employers' Liability Act, but that it did limit the jurisdiction of the federal court as is provided for in the act, and defined the jurisdiction of that court as being concurrent with that of the courts of the several states. In fact, the very language used by Congress in the act amounts to a recognition of the jurisdiction of the state courts, for the state courts are not, by the terms of the act, granted jurisdiction concurrent with the federal court, but, on the contrary, the federal court is given jurisdiction concurrent with the state courts, thus recognizing the jurisdiction existing previously to the amendment to the Employers' Liability Act in the state courts.

There is nothing in the federal Employers' Liability Act as amended which is indicative of an intent on the part of Congress to prohibit a court of equity from so regulating the conduct of its own citizens by an injunction as to prevent hardship, oppression, or fraud, and if prior to the passage of such Employers' Liability Act the power existed in a court to grant relief by injunction as indicated, such power continued to exist and now exists.

In *Reed's Adm'x v. Ill. Cent. R. Co.* 182 Ky. 455, 206 S. W. 794, the supreme court of Kentucky uses this language:

"The federal act does not, as we think, take away from the courts the power they possessed before its enactment to restrain the plaintiff in a transitory suit from doing an inequitable and unconscionable thing that would subject the defendant to great and unnecessary cost and inconvenience. Before the passage of this act the plaintiff had exactly the same legal right to institute her action in any court having jurisdiction, in which the railroad company could have been

brought before the court, as she does now to bring it in the three places specified in the act. It therefore seems to us that, if it was allowable in a proper state of case before the act to enjoin the plaintiff from bringing a suit in a court and at a place where under the law she had the right to bring it, it must be equally allowable to do so since the act, because the act merely limits instead of enlarging the places where the suit must be brought, and it confers no more right to bring the suit in the places named in the act than the general law before the act conferred the right to bring the suit at any place where the defendant could be brought before a court having jurisdiction."

In connection with the inquiry raised by defendant's counsel, above referred to, it is proper also to consider the second question raised, namely, Can the circuit court for Rock county restrain the prosecution of an action which is transitory in any court which has jurisdiction of such an action?

That a personal-injury action is transitory is so well established as to require no citation of authorities. A number of cases are referred to and cited by counsel for defendant which hold that where a state creates a transitory action and the act creating the right of action, among other things, provides certain conditions precedent to the commencement of the action, such as the giving of notice, etc., that having once created a transitory action it cannot limit the bringing of such action to the jurisdiction of its own courts and prohibit the prosecution thereof in the courts of foreign jurisdictions, where proper service of the defendant may be made. That this doctrine is well founded cannot be denied; in fact, the correctness of the doctrine is universally recognized by all the decisions that we have been able to find. The propositions, however, contended for by counsel for the defendant in no way are germane to or affect the chief question involved in this case, which is the right of a court of equity to regulate the conduct of its own citizens so as to prevent hardship, oppression, or fraud.

This court, in an opinion rendered by the late Mr. Chief Justice WINSLOW in *Griggs v. Docter,* 89 Wis. 161, 61 N. W. 761, clearly recognizes and approves of a court of equity granting relief by injunction in a proper case, and the opinion recites, among other things: "The jurisdiction of equity in actions of this nature is well established."

Such jurisdiction is also recognized by this court in *Akerly v. Vilas,* 15 Wis. 401.

In High, Injunctions (4th ed.) § 106, the weight of authority as shown by the decisions is set forth as follows:

"And while there is a lack of uniformity, amounting even to a conflict of authority, in the decided cases, the English rule seems to have the support of the clear weight of authority; and the courts of one state will, in a proper case, enjoin persons within their jurisdiction from instituting legal proceedings in other states, or from further proceedings in actions already begun. As we have seen in a preceding section, a distinction is drawn between a court of equity interfering with the action of the courts of a foreign state, and restraining persons within its own jurisdiction from using foreign tribunals as instruments of wrong and oppression. While, therefore, the court will assume no control over the course of the proceedings in the foreign tribunal, it may and will interfere to prevent those who are amenable to its own process from instituting or carrying on suits in other states which will result in injury and fraud."

The doctrine is also well set forth under the subject of "Injunctions" in 14 Ruling Case Law, p. 413, § 114, of the chapter of said work so entitled:

"The jurisdiction rests on the authority vested in courts of equity over persons within the limits of their jurisdiction, to restrain them from doing inequitable acts to the wrong and injury of others, and on the power of the state to compel its own citizens to respect its laws, even beyond its own territorial limits. The court proceeds on the theory that as long as a citizen belongs to a state, he owes it obedience; and that as between states, the state in which he is domiciled has jurisdiction over his person and his personal relations to other citizens of the state. In the exercise of this

power there is no attempt to render the foreign tribunal subject to the control or direction of the lower court or to, in any way, exercise a supervisory power over it. There is a clear distinction between an injunction against the proceedings of a court in another state, and the power and authority of such court and one to restrain the personal action of a citizen. In the first case the court has no jurisdiction, while in the other it proceeds *in personam* against the defendant, directing him to proceed no further in the action, without regard to the fact that the *res* of the controversy may be outside of the territorial jurisdiction of the court, for in such a case the court has the power to compel a party to do all the things necessary according to the *lex loci rei sitæ* which he could do voluntarily to give full effect to the decree against him."

In § 115, p. 414, this work further says:

"No general rule can be laid down as to when the court ought to enjoin a party from prosecuting a suit in a foreign jurisdiction. Each case must be ruled by its own facts. If they show that it is necessary and equitable to exercise the power in the orderly administration of justice, the court should enjoin the party, otherwise not." See, also, citations of numerous authorities bearing out the text under said section.

In any event, it is claimed by counsel for defendant that the showing made by the plaintiff herein was not sufficient to warrant the interposition of a court of equity to grant the equitable relief prayed for.

Sec. 4096 of the Statutes confers the right upon either party to examine the other before trial, and it is contended by plaintiff's counsel that, inasmuch as the action of the defendant against the plaintiff was brought in a state court in Minnesota, the prosecution of such action in such court deprives the parties hereto of the benefit of an adverse examination before pleading, as is provided for in the Wisconsin statute.

The privileges of an examination under sec. 4096 refer not to a matter of substantive law, but to one of procedure.

Kentucky F. Corp. v. Paramount A. E. Corp. 171 Wis. 586, 178 N. W. 9.

We cannot say that the deprivation of the privilege granted under the Wisconsin statute is of such a nature as will work hardship, oppression, or fraud. Furthermore, both parties with respect to the matter complained of stand on an equal basis. The federal Employers' Liability Act contemplates a number of jurisdictions in which an action brought under this act may be prosecuted, and it is but reasonable to assume that discretionary power is vested in a plaintiff to bring his action in any court having jurisdiction, without being restrained by injunction, so long as the exercise of his right does not so materially interfere with the rights of the other party as to result in fraud, hardship, or oppression.

It is further contended by the plaintiff that the prosecution of defendant's action in the state of Minnesota, where a verdict can be rendered by agreement of ten or more jurors, is a great disadvantage to the plaintiff, and deprives it of the right guaranteed under the constitution and laws of Wisconsin, to a verdict rendered pursuant to the unanimous agreement of the entire jury. The Minnesota statute pursuant to which a verdict may be rendered upon an agreement of ten or more jurors has been declared constitutional by the supreme court of the United States in the case of *Minneapolis & St. L. R. Co. v. Bombolis,* 241 U. S. 211, 36 Sup. Ct. 595.

The act provides, among other things, that the action may be brought in a district where the defendant shall be doing business at the time of commencement of such action. Renville county, Minnesota, being located in such a district, the right of the defendant herein to commence his action in that district cannot in good faith be challenged, and is not challenged in this case. The defendant having been granted the right to select, within the purview of the act, the venue of the action, and the venue being in a state which does not require the unanimous verdict of a jury, it can-

not be said that the decision of the defendant in bringing his action in that district works a hardship, oppression, or fraud against the plaintiff herein. Besides, what has been said with respect to the contention in regard to the discovery statute may properly here be repeated, namely, that the advantages or disadvantages of such a constitutional provision as exists in Minnesota act mutually and with equal force and effect upon both of the parties.

The same reasoning also applies to the contention of the plaintiff herein that the trial of the action in the state of Minnesota deprives the party of a right to have the jury view the premises.

It is further contended by the plaintiff herein that a court of equity should intercede in its behalf and restrain the prosecution of defendant's action in the state of Minnesota for the reason that no power exists in the Minnesota court to compel the attendance of witnesses residing in the state of Wisconsin; and that inasmuch as it has a large number of witnesses, fifteen in number, who reside in the county of Rock in the state of Wisconsin, a distance of about 500 miles from the place of trial in the state of Minnesota, the testimony of such witnesses may have to be taken by deposition, and thus the plaintiff will be deprived of the advantage of having the witnesses personally appear in court and give their testimony.

It is also contended by the plaintiff herein that the production of its witnesses and the attendance of its counsel upon the trial in the state of Minnesota will involve considerable expense, and that the matters above set forth consequently will work a hardship and inequity to the plaintiff.

The court has seriously considered the contention last referred to, and is of the opinion that this contention is not entirely without merit. The court fully recognizes the importance to a party of having its witnesses appear personally in court. It also appreciates what is claimed by the plaint-

iff that the attendance of the Wisconsin witnesses upon the trial in the Minnesota court involves some considerable expense. It cannot be denied that a situation may be presented where the selection of a forum may work hardship or oppression. However, the action was brought in a neighboring state, and, while the distance may be considerable, we cannot say we are satisfied that such selection of a forum on the part of the defendant herein for the trial of his action will work such hardship or oppression as to warrant the intervention of the powers of a court of equity to restrain the further prosecution of such action.

The language of Chancellor PITNEY in *Bigelow v. Old Dominion C. M. & S. Co.* 74 N. J. Eq. 457, 71 Atl. 153, is pertinent and applicable to the matter under consideration. In the decision in the latter case the chancellor says:

"But, on general principles, equity will not interfere with the right of any person to bring an action for the redress of grievances—the right preservative of all rights—except for grave reasons, and on grounds of comity the power of one state to interfere with a litigant who is in due course pursuing his rights and remedies in the courts of another state ought to be sparingly exercised. . . . They must be very special circumstances that will justify this court in restraining the prosecution of an equitable action already pending in a court of such ample jurisdiction. I speak not of any limitation upon the power of this court, but upon the propriety of its exercise in the particular case. Its exercise is not to be properly based upon any theory that this court knows better how to do justice than the court of last resort of that commonwealth; that it can weigh evidence better or more justly apply to the facts any general principle of law or equity, nor upon the ground that this court recognizes different rules of law or of equity from those which obtain in the commonwealth." See, also, 14 Ruling Case Law, p. 418, § 120, on "Injunctions;" *Carson v. Dunham,* 149 Mass. 52, 20 N. E. 312, 3 L. R. A. 203.

We therefore conclude that the inability of the plaintiff herein to compel the attendance of its witnesses in the trial

court in the state of Minnesota, and the additional expense involved in producing such witnesses upon such trial, and the fact that the testimony of some of the witnesses may have to be taken by deposition, does not constitute such oppression as justified the Wisconsin court in issuing its restraining order.

Plaintiff herein also charges that the defendant's attorneys, in procuring the authority to prosecute defendant's action for personal injuries, were guilty of what is commonly known in the profession as "ambulance chasing," and that as the result of such employment so obtained defendant's action is not being prosecuted in Minnesota in good faith but from ulterior motives, primarily designed to promote the business of such counsel engaged in such reprehensible practice.

That such practices have been indulged in extensively by counsel, both in the state of Wisconsin and in the state of Minnesota, is a matter well known to the profession and to the courts. We are also aware that in both states these practices have been emphatically denounced by the state and local bar associations. It is a practice that tends to lower the ethical standard of the profession of the law and has contributed in a large measure to the disrespect which exists among the public with respect to the profession. The practice of the law is an ancient and honored profession, and we number among its followers at all times some of the ablest, most distinguished, and honored citizens of our country. This offensive solicitation of legal business has a tendency to commercialize the business of the profession, to degrade it, and to lower its standard. The practice of it is in violation of the oath that every attorney is required to take, and no reputable attorney in this state or elsewhere will resort to it. However, this is a practice which attorneys may be guilty of, and which reflects primarily upon their character as attorneys, and which may afford ample reason for disbarment, but which does not to a considerable degree in-

volve the client. The offense of ambulance chasing is one which is within the proper jurisdiction of bar associations to eradicate and for the legislatures of the various states to condemn. In the instant case the allegations in the complaint herein with respect to the offensive conduct of defendant's counsel are met with a general denial, and we cannot say from the record as it thus is brought to us that defendant's counsel have as a matter of fact been guilty of the pernicious activities with which they have been charged. However, had it been made to appear in this case that counsel had been guilty of such practices and that the defendant herein had materially co-operated with counsel in regard to the same, we would seriously consider this charge in connection with the other reasons assigned upon which the application for an injunction was based. In any event, we consider the relief granted by the trial court too broad, and such relief should have been confined, assuming that a proper case for injunction had been presented in the instant case, to the injunction with respect to the further prosecution of defendant's action in the county of Renville.

By the Court.—The judgment of the lower court is reversed, and the cause remanded with directions to dismiss the complaint.

A motion for a rehearing was denied, with $25 costs, on January 10, 1922.

MUELLER, Respondent, vs. DERWAE, Appellant.

October 18, 1921—January 10, 1922.

Landlord and tenant: Tenancy for fixed term: Notice to quit unnecessary: Erroneous judgment: Res judicata.

1. Where an unlawful detainer proceeding involving the question of whether a tenancy was from month to month or for the period of a year was settled by an agreement that the tenant

should remain in possession until a specified date, the landlord was not required to give the tenant notice to quit on such date under sub. (3), sec. 3358, Stats., in order to maintain another action of unlawful detainer, since the tenancy terminated on such date by express agreement under sub. (1) of that section.

2. A judgment in favor of the tenant in unlawful detainer proceedings, even though erroneous, where it is not appealed from, is *res judicata* in a subsequent action involving the same issue.

APPEAL from a judgment of the circuit court for Brown county. HENRY GRAASS, Circuit Judge. *Reversed.*

For some time prior to September 16, 1919, the defendant was a tenant in possession of a house belonging to the plaintiff. About that time some arrangement was made whereby defendant relinquished possession of the second floor to plaintiff, who thereafter occupied the same, defendant remaining in possession of the first floor. From that time on defendant paid at the rate of $12 per month and generally on the 6th day of each month for the period just past.

In May, 1920, the plaintiff commenced an action of unlawful detainer against defendant, but before trial an agreement was reached between the parties and the case dismissed without testimony having been taken, and a written stipulation signed by both. The material parts are as follows:

"For the purpose of settling the case brought by *Ida Mueller* and *Victor Derwae* in justice court before Thomas E. Hawley May 12, 1920, it is hereby agreed between the parties:

"1. That *Victor Derwae* shall remain in possession of the premises leased according to his agreement until August 25, 1920.

"2. That at that time he shall replace the moulding in the parlor if *Miss Ida Mueller* desires."

There were four other conditions, not material here, as to work to be done by defendant upon the premises.

About August 10, 1920, plaintiff caused to be delivered to defendant a written notice to the effect that his lease

would expire August 25, 1920, and that plaintiff expected him to vacate said premises in accordance with the agreement and lease.

The defendant did not vacate on August 25, 1920, and September 2d the plaintiff again commenced an action of unlawful detainer by a complaint verified August 30th. The complaint recited, in substance, the renting of the premises by plaintiff to defendant at $12 per month; the serving on April 13, 1920, of a month's notice to quit; the starting of an unlawful detainer action then against the defendant, wherein the defendant interposed an answer claiming that he was occupying the said premises under a verbal lease for one year terminating August 25, 1920; that the parties in such action made the stipulation above recited; that on or about July 25, 1920 (this, however, in fact was the one of August 10th above recited), the plaintiff served on the defendant a written notice demanding possession of the premises August 25, 1920. Plaintiff also alleged the continued occupation of said premises by defendant and his refusal to deliver them up and that he was holding over without plaintiff's permission, and prayed for the issuing of a summons and that proceedings be had whereby the defendant be removed.

To such complaint the defendant pleaded not guilty and denied each and every allegation of the complaint. The justice of the peace heard the cause on September 8th and then rendered his judgment finding the defendant not guilty and assessing costs against the plaintiff, who thereafter paid the same and took no further steps in said action.

On September 7th the plaintiff accepted from the defendant the sum of $12 which would be a payment for the period up to that date. This fact appeared in the trial on the 8th.

On October 1, 1920, the plaintiff commenced another action of unlawful detainer in the municipal court of Brown county as before a justice of the peace. This complaint al-

leges, as before, the renting of the premises; that the defendant prior to May 1, 1920, was in possession as plaintiff's tenant; that a dispute arose with reference to their respective rights and terms resulting in an action at law; that such matter was settled by a written agreement of May 19th whereby said defendant agreed to vacate and surrender the premises on August 25th and that plaintiff agreed to allow him to remain in such possession until such time; the serving of the notice of August 10th, *supra;* that the plaintiff has repeatedly demanded of defendant that he vacate and surrender such premises; that she never consented that he hold the same beyond August 25th; that up to and including October 1, 1920, and in spite of requests and demands, defendant refused and neglects to vacate or surrender possession and now holds the same without permission and without right, and prays that defendant be removed and that a summons be issued pursuant to ch. 145, Stats.

Defendant answered admitting the possession of the premises prior to May 1, 1920, as plaintiff's tenant; denied the other allegations of the complaint, and further alleged the unlawful detainer proceedings commenced September 2d, the trial thereof, the entry of judgment of September 8th and in defendant's favor, and that all the issues presented in the case at bar were judicially passed upon and determined in said other action and that no appeal had been taken from the judgment therein, and for that reason the complaint should be dismissed.

Testimony was taken before the municipal court, the record in the unlawful detainer action commenced September 2d was received in evidence, and the justice of the peace before whom the same was tried testified that there was tried in that action the question whether or not the defendant held under a verbal lease and as to whether or not he was a tenant from year to year or from month to month, and that he decided and determined whether or not notice

had been given to vacate the tenancy; that a notice was necessary to terminate the tenancy; and upon the meaning of the stipulation of May 17th, *supra*. That the decision made in the case before him was one finding the defendant not guilty of unlawfully withholding the property, that such was entered in the docket, costs were taxed, and the complaint dismissed.

The municipal court held that the defendant was guilty as alleged in the complaint, and from the judgment thereon the defendant appealed to the circuit court.

The circuit court found that defendant's rights to the premises expired August 25, 1920, that there was an unlawful withholding of possession by defendant at the time of the commencement of this action October 1, 1920, and that on such day the plaintiff was entitled to the possession thereof and was not barred or estopped in any manner from maintaining the action, and directed judgment of restitution with costs in favor of plaintiff. From such judgment the defendant has appealed.

For the appellant there was a brief by *Fairchild, North, Parker & Bie* of Green Bay, and oral argument by *Walter T. Bie*.

Sol. P. Huntington of Green Bay, for the respondent.

The following opinion was filed November 15, 1921:

ESCHWEILER, J. In the unlawful detainer proceedings of May, 1920, plaintiff claimed defendant was a tenant from month to month, defendant that he was a tenant under a one-year term expiring August 25, 1920. The dispute between them on that point was not then settled, but the case was dismissed with a written stipulation providing, as quoted above, that defendant shall remain in possession of the leased premises according to his agreement until August 25, 1920.

Whether his prior possession was as a tenant from month to month or for a one-year term is just now immaterial, because under the law his tenancy, whatever it was, termi-

nated by express agreement on August 25th, and no prior notice was necessary to effectually terminate it at that time, nor after that date was notice required in order that plaintiff maintain an action for unlawful detainer. By his holding possession after the fixed expiration of his term by lapse of time he was within the provisions of sub. (1), sec. 3358, Stats., and one so situated need not be served with even the short three-days notice provided for in sub. (3) of the same statute. *Toal v. Clapp,* 64 Wis. 223, 24 N. W. 876; *Eldred v. Sherman,* 81 Wis. 182, 188, 51 N. W. 441; *Smith v. Littlefield,* 51 N. Y. 539.

Under the law and the facts, therefore, the proper judgment to have been entered on September 8th by the justice of the peace should have been one finding the defendant guilty of unlawfully withholding possession and directing restitution forthwith. The justice, however, erroneously held otherwise and rendered a judgment for defendant. Necessarily such judgment determined that the relationship between the parties subsequent to August 25th was of such a nature that the defendant was considered to be in lawful possession of the premises at least until the date of such judgment.

A prompt appeal from such erroneous judgment would undoubtedly have resulted in a reversal thereof and the entry of a proper one. The plaintiff, however, took no appeal therefrom and paid the costs assessed against her by such judgment.

Then, on September 30th, this action is commenced and identically the same grounds for relief are set forth here in the complaint as were set forth in the action so disposed of on September 8th; the parties are the same; the alleged relationship between them prior to May, 1920, and from then on to August 25th, is the same; the dismissal of the action and stipulation therein of May, 1920, are also set forth; the only difference in the recitals of the two complaints is of the mere lapse of time. No fact is here recited or relied upon tending to show that there was any change in

the relationship between the two, so far as the possession of the premises is concerned, between August 25th, September 2d, September 8th, and the commencement of this action on September 30th.

In such situation the defendant interposed the plea of *res judicata,* basing it upon the prior judgment of September 8th, and such plea should have been sustained.

In the action decided on September 8th plaintiff was required to prove, in order to be entitled to judgment, that there was an unlawful holding of the premises by defendant after August 25th, his prior possession being unquestionably lawful. But under the undisputed facts in that case and in this, the relationship between the parties as to the possession was in substance and effect the same on the 28th of August, 2d, 8th, and 30th of September, and all intervening times; that is, if defendant as a matter of law was in lawful possession of the premises on September 2d and 8th, he was equally so on September 30th, and *vice versa.*

The court, having jurisdiction of the parties and subject matter, mistakenly decided on September 8th that defendant was in lawful possession for a period subsequent to August 25th. This judgment, though erroneous, being allowed to remain, settled and determined the question of the relationship between the parties from and after August 25th, and necessarily, until, by operation of law or by act of one or the other of the parties, some change in such relationship arose.

The conclusiveness of such a judgment is not impaired because based upon a mistaken view of the law that should control the situation. *Baker v. Baker,* 57 Wis. 382, 391, 15 N. W. 425; *Hart v. Moulton,* 104 Wis. 349, 353, 80 N. W. 599; *Marin v. Augedahl,* 247 U. S. 142, 149, 38 Sup. Ct. 452; *Fauntleroy v. Lum,* 210 U. S. 230, 237, 28 Sup. Ct. 641.

All the requisite identities as to parties, cause, and questions to be determined that must exist in order to make the first judgment a bar in the second action are here present.

Rowell v. Smith, 123 Wis. 510, 516, 102 N. W. 1; *Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589; *Hart v. Moulton,* 104 Wis. 349, 353, 80 N. W. 599; *Rahr v. Wittmann,* 147 Wis. 195, 132 N. W. 1107; *Greenleaf v. Ludington,* 15 Wis. 558, 568; *Bates v. Bodie,* 245 U. S. 520, 526, 38 Sup. Ct. 182; *Northern Pac. R. Co. v. Slaght,* 205 U. S. 122, 130, 27 Sup. Ct. 442.

The fact that the day prior to the trial and entry of judgment on September 8th the defendant paid and the plaintiff received a sum equal to the agreed rental of $12 per month has no bearing in the present disposition of this case; first, because it covered a period which included the time from August 6th to August 25th while defendant was in conceded lawful possession as well as for the period from August 25th to September 6th, and was paid while plaintiff was still consistently, by the carrying on of the then pending action of unlawful detainer, maintaining a position contrary to any express or implied recognition of defendant's then possession being lawful under some new form of tenancy, such as at will or for a term of one year (*Palmer v. City L. Co.* 98 Wis. 33, 73 N. W. 559); and second, the fact of such payment was in the record before the justice of the peace when he disposed of the case on September 8th, and the effect thereof would necessarily be for determination before him in making his then decision.

The manifest want of equity or righteousness in the position taken by the defendant in so remaining in possession after August 25th cannot, however, prevent the application of the principle here followed, which is the basis of the long established doctrine of the conclusive effect to be given to judgments in order that there may be an end, within reason, of litigation.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the complaint.

A motion for a rehearing was denied, with $25 costs, on January 10, 1922.

DOMAIKI, Respondent, vs. LIBERTY LAND & INVESTMENT COMPANY, Appellant.

October 19, 1921—January 10, 1922.

Fraud: False representations as to lands: Evidence: Sufficiency: Interest on amount found as damages.

1. In an action for damages because of false representations in the negotiations prior to an exchange of lands, it is *held* that the findings of the jury that the defendant falsely pointed out the lands which plaintiff was to receive, and falsely represented that the lands extended to a highway, and that the difference in value between the lands pointed out to plaintiff and those conveyed to him was $1,255, are sustained by the evidence.
2. Since plaintiff paid $1,255 in excess of the amount defendant was entitled to, the plaintiff was wrongfully deprived of its use, and was therefore entitled to recover interest from the date of the transaction.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Affirmed.*

This action was brought to recover damages alleged to have been sustained by plaintiff through misrepresentations made by defendant in negotiations leading up to an exchange by plaintiff of a house and lot in Rockford, Illinois, for three government lots of defendant in Oneida county, Wisconsin.

Plaintiff claims that he was not familiar with the English language and that he relied on defendant's agents, who conversed with him in Lithuanian, in all matters pertaining to the transaction in question; that he went to Oneida county at the request of defendant's officers, where he was shown lands described as lots 3, 4, and 5 in section 19, township 36; that the lands pointed out and shown to him by defendant's agents were all high, level land of good quality; that to the south of the land shown him there seemed to be a large amount of swamp land, which defendant informed

plaintiff would not be a part of the land he was to buy; that defendant further represented to the plaintiff that a certain road lay next to and went through the land so shown plaintiff as the land he was to buy, and that all of the land he was to get was high, level, and good farming land and contained 125.96 acres; that, relying on these representations, he was induced to make an exchange of property whereby he deeded his house and lot in Rockford, valued at $3,400, and executed and delivered a note and mortgage for $1,143, in all to the amount of $4,543, in exchange for a deed from defendant covering the lots above mentioned; that these representations made by defendant were false; that in truth the swamp which defendant represented would not be on the land conveyed to plaintiff was practically all on lots 4 and 5 as conveyed to plaintiff; that approximately twenty-five acres of said land was and is swamp land, absolutely unfitted for farming purposes and valueless to this plaintiff; that this land does not adjoin the road pointed out to plaintiff, nor any road; that instead of 125.96 acres of land there are only approximately 105.15 acres in the entire tract so conveyed to this plaintiff, of which not to exceed eighty-five acres are as represented; that the land which this plaintiff was shown by the defendant and which he supposed he was buying is in lots 2, 3, and 4 instead of lots 3, 4, and 5; that as a further inducement the defendant represented to the plaintiff that the defendant would help the plaintiff clear ten acres of land during the summer of 1919; that, relying on these considerations and false representations, the plaintiff was induced to make the exchange and purchase the land above mentioned. Damages were asked in the sum of $2,000.

Defendant alleges that plaintiff came to Woodboro in the latter part of July, 1918, and after making a thorough examination of the property of defendant selected lot 6 of section 17, and lots 4 and 5 of section 20, and lot 3 of section 19

as the lots for which he desired to exchange his Rockford property; that about two weeks thereafter a contract in writing was entered into between the plaintiff and the defendant for an exchange of the lands, but that in October, 1918, plaintiff came again to the town of Woodboro and after making another examination of the lands of the defendant in the neighborhood requested defendant to cancel the first contract and to enter into a new contract for the exchange of his Rockford property for the lands conveyed to him by deed; that the exchange was made under the conditions recited in the complaint. Defendant denies that any misrepresentations were made by its agents and alleges that the lands in question contain 125.96 acres according to the government survey.

By a special verdict the jury found (1) that the defendant's agents represented to plaintiff that lots 3, 4, and 5 included lands which actually lie north of lot 3; (2) that they did not include the swamp land which is actually found on lot 5; (3) that the defendant's agents represented to plaintiff that lots 3, 4, and 5 extended eastward to the highway next adjoining; (4) that the plaintiff relied on these representations in making his contract; (5) that the lands represented to be lots 3, 4, and 5 to the plaintiff were of greater value than the lands which were actually included in the lots conveyed to him; (6) that the amount of the difference in the values was $1,255.

Judgment was granted in plaintiff's favor on the special verdict, from which judgment the defendant appeals.

For the appellant the cause was submitted on the brief of *E. D. Minahan* of Rhinelander.

Charles F. Smith of Rhinelander, for the respondent.

The following opinion was filed November 15, 1921:

SIEBECKER, C. J. In this case it is held that the evidence adduced on the trial of the action abundantly supports the findings of the jury to the effect that the defendant's officers

misrepresented to the plaintiff what lands were actually included in lots 3, 4, and 5 which were conveyed to plaintiff, and that such lots were falsely represented by defendant's officers to include lands which actually lie to the north of lot 3; that lots 3, 4, and 5 did not include the swamp land which is in fact a part of the lots conveyed to him. The evidence also sustains the finding of the jury that defendant's agents falsely represented that government lots 3, 4, and 5, embraced in plaintiff's deed, extended eastward to the next adjoining highway. It is considered that the evidence in the case justified the jury in concluding that the lands which were represented to plaintiff to constitute lots 3, 4, and 5 were of greater value than the lands actually embraced in lots 3, 4, and 5, and that such difference amounts to $1,255. We think the trial court is correct in holding that upon the evidence

"The jury were charged with the duty of finding, upon the evidence thus placed before them, the value in 1918 of land of the character and quality of lots 3 and 4 and land lying north thereof, and also the value in 1918 of lot 5, according to the boundaries now actually found to be possessed by it. . . . While it might be that the court, if charged with the duty of assessing damages in this case, would not have found the difference so great, it seems to the court, upon the evidence presented to the jury, that it was within the province of the jury to make the finding which it did, and that the court has neither the duty nor the right to interfere with that finding of the jury."

Since the evidence sustains the conclusion that plaintiff, through defendant's false and fraudulent representation, paid defendant $1,255 in excess of what should have been paid to it, the conclusion logically follows that the defendant not only received this $1,255 wrongfully, but also that the plaintiff was wrongfully deprived of its use from the time of the conveyance of the property and that the defendant had the benefit of its use, thus damaging the plaintiff to the amount of the value of such use, which is measured by the

reasonable interest on such amount. We think the court properly awarded the plaintiff recovery of six per cent. interest from the date of the transaction to the date of judgment on the amount of the damages found by the jury as an item of the damages the plaintiff sustained.

By the Court.—The judgment appealed from is affirmed.

A motion for a rehearing was denied, with $10 costs, on January 10, 1922.

SHAVER, Respondent, vs. DAVIS, Agent under Transportation Act of 1920, Appellant.

October 21, 1921—January 10, 1922.

Railroads: Accident at grade crossing: Excessive speed of train: Look-and-listen rule: When violation is excused: Contributory negligence: Proximate cause: Questions for jury.

1. In an action by the driver of a motor truck for injuries sustained in a collision with defendant's train at a railroad crossing, the question whether the train was moving in excess of twelve miles an hour as it approached and was within twenty rods of the crossing was for the jury.
2. One who drives a motor truck upon a railroad crossing without looking or listening and paying no attention to an approaching train is guilty of contributory negligence, in the absence of an explanation of such conduct.
3. The burden of showing such contributory negligence is ordinarily on the defendant.
4. It was the duty of the jury, in connection with all the other evidence, to consider photographs of the scene of the accident, but they are not controlling on appeal, since photographs may convey false impressions though honestly taken.
5. If a verdict is wholly unwarranted by the evidence or is the result of passion or prejudice, a new trial may be granted in the discretion of the court; but if it is one that reasonable men might find, it is not the duty of the court to disturb the decision of fact, which the law has confided to juries. If there is any credible evidence to support a verdict it cannot be dis-

turbed, and a judgment of the trial court sustaining it should not be set aside unless clearly wrong.

6. The look-and-listen rule is to be considered in connection with all the facts, and must be relaxed where the requirements of sub. 6, sec. 1809, Stats., are not complied with; and where plaintiff was unfamiliar with the existence of the crossing, the track being without fences or cattle-guards and situated in the outskirts of a city, and there was testimony that it was obscured by snow, a finding that there was no contributory negligence will not be disturbed.

7. Where the jury might have believed that there was a causal relation between the speed of the train and the extent of the injury, and that if the train had been going at a lesser rate of speed the injury would have been less serious or might not have occurred, a finding that defendant's negligence was the proximate cause of the injury will be sustained.

APPEAL from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment in favor of the plaintiff for $4,794.77.

On February 23, 1920, shortly before noon, the plaintiff, while driving an auto truck east on Grove street in the outskirts of the city of Fond du Lac, was struck at a grade crossing by a train which was "coasting" north, down grade, with the steam shut off. The day was clear and cold; a wind was blowing from the northwest; a "Look out for the cars" sign was in full view on the west side of the crossing.

At all points within 130 feet on the west side there was an unobstructed view of the right of way to the south for several hundred feet. The track was a spur or branch; there was no line of telegraph poles along the right of way, and there were no fences or cattle-guards at the crossing. Neither was there a watchman nor any automatic guard or signal.

Within the hour preceding the accident the plaintiff went over this same crossing with a load of gravel. Returning he came to the bridge spanning the Fond du Lac river. He entered the bridge on low, shifted to second in the middle, then

into third as he left the bridge and approached the crossing a few yards ahead. The engine struck the right hind wheel, the force of the impact throwing the truck several yards down the right of way, and the plaintiff was pinned under the wreckage.

There had been a snowfall the night before. During the early morning there had been a wind strong enough to drift the snow in places. There was conflicting testimony as to the depth of snow in the road in the vicinity of the crossing, the plaintiff estimating it at eight inches. Before 8:30 at least three trains had gone over the crossing in question.

The plaintiff denied knowledge of the existence of the crossing. He had lived in the city of Fond du Lac for eight years. For three years he had been a drayman.

The complaint alleges that the plaintiff did not know of the crossing; that there were no advanced warning signs as required by statute; that, because of the inclosed cab of his truck, he could not see the "Look out for the cars" sign; that he did not see the track because it was covered with snow; and that he did not look for a train because he had no knowledge of the existence of the crossing. He further alleges that the train was being run at a negligent rate of speed far in excess of the statutory twelve miles per hour; that he heard no bell or whistle and believes that no such warning was given; and that by reason solely of the alleged negligence he had suffered the injury complained of.

The defendant took issue on all allegations of negligence.

The "Look out for the cars" sign was in full view, and if the plaintiff had looked he would have seen the train. It seems established that the whistle was blown and the bell rung at the proper places. As to the speed of the train there was conflicting evidence. The plaintiff testified that if he had looked he would have seen the train; that there was nothing to prevent his looking south to see it; that he could have looked out of the window in the cab of his truck; that he would have seen the "Look out" sign if he had looked;

that his hearing and eyesight were good; that the wind-shield was open; that he did not look either way; paid no attention to the surroundings and drove straight ahead; that he did not notice whether there was a railroad sign ahead; and that he did not hear the bell or whistle and was not listening.

The testimony of the fireman and the engineer was, in substance, that the fireman saw the truck when it was about 100 feet from the crossing; that the fireman shouted to the engineer, who applied the brakes three or four feet from the point of collision, the train coming to a stop within 120 feet.

In answer to the defendant's allegation of contributory negligence the plaintiff contends that, not knowing of the existence of the crossing, he was not negligent in failing to look for a train.

Plaintiff produced one witness who swore that in his judgment the train was going from twenty to thirty miles an hour, another twenty-five miles an hour, and another that on the following day the same train was going from twenty-five to thirty miles per hour. This last statement was made competent by the testimony of the defendant's fireman that it was being run in the same manner that day as the day before. Defendant's witnesses testified that it was being run at the rate of from eight to ten miles an hour. There was some other testimony given by both parties where less definite figures were given.

Some testimony was given in behalf of the defendant as to the distance in which a train going twenty-five or thirty miles an hour could be stopped. Plaintiff's testimony tended to show that the train stopped about 175 feet from the place of collision. There was testimony that a 700-pound wheel of the demolished truck was wedged between the pilot and the track, serving as a brake, and that the truck weighed nearly six tons and was hurled a distance of about twenty-five feet.

In a special verdict the jury found, in substance, that the train was moving in excess of twelve miles an hour as it

approached within twenty rods of the crossing; that the above want of care was the proximate cause of the injury; that the plaintiff used ordinary care in respect to keeping a lookout; and that the amount of the damage was $4,600.

The usual motions were made, and judgment was ordered for the plaintiff.

For the appellant there was a brief by *H. J. Killilea* of Milwaukee and *Williams & Foster* of Fond du Lac, and oral argument by *Mr. Killilea.*

For the respondent there was a brief by *Reilly & O'Brien* and *L. J. Fellenz,* all of Fond du Lac, and oral argument by *Mr. Fellenz* and *Mr. J. E. O'Brien.*

The following opinion was filed November 15, 1921:

JONES, J. In view of the testimony it is clear that the trial court would not have been justified in taking from the jury the question of the rate of speed of the train nor in changing their answer that the train was moving in excess of twelve miles an hour as it approached and was within twenty rods of the crossing.

Appellant's counsel rely on *Riger v. C. & N. W. R. Co.* 156 Wis. 86, 144 N. W. 204, where in the opinion of one witness, formed from imperfect observation, the rate of speed was estimated at about sixteen or seventeen miles per hour, and where five witnesses testified that the rate was from four to seven miles an hour, and where the train was stopped within thirty feet after the signal. We do not consider the two cases at all analogous. See *Swalm v. N. P. R. Co.* 143 Wis. 442, 128 N. W. 62.

A much more serious objection raised by appellant is that the testimony showed the contributory negligence of plaintiff. The substance of his testimony was that he did not look nor listen and paid no attention to the approaching train. Without any explanation his frank admission of these facts would be proof of the baldest negligence, and according to a long line of decisions of this court would defeat his action.

There are numerous circumstances relied on as an explanation, and the question is whether they sufficed to present a question for the jury. Plaintiff's evidence is undisputed that he had never crossed this spur track, which was about 1,200 feet from the western limits of the city, until the day of the accident. He had passed over the main line on Military street at a point 1,780 feet farther south at least four times on other occasions, but the track in question left the main track about thirty-seven feet north of Military street.

He knew of the three lines of railway running north through Fond du Lac and had passed over them on the forenoon of the day of the accident on his trip to the gravel pit. On this spur track, with which he said he was not familiar, there were no telegraph poles and no cattle-guards or fences.

There had been a snowfall during the preceding night of three inches or more, and with a northwest wind the snow was blowing and drifting. There was the testimony of several witnesses besides the plaintiff that at the time of the accident the track was all covered with snow and that in places off the track there were drifts three or four feet deep.

The plaintiff testified that he had much trouble managing the truck on account of the snow; that he had to raise the wind-shield three or four inches in order to see to drive; that chains were on all four of the wheels; and that in order to reach a lever and shift gears in managing the machine he had to bend over.

The train was running down grade at a speed which the jury found beyond the legal rate, with the steam shut off—hence with less than the usual noise,—and the wind was blowing from a direction opposite to that of the train.

Both parties introduced photographs in evidence and both parties rely on them. Small ones were taken by defendant's agents on the afternoon of the accident, some of which showed that the rails were plainly, and others dimly, visible. Large photographs taken two days after the accident showed very clearly that the view was unobstructed as claimed and

that at that time the rails at the crossing could be plainly seen. Plaintiff's photographs, all taken in the afternoon of the day of the injury, show the rails as scarcely visible, and the dismantled truck imbedded in deep snow-drifts. Except in one of the defendant's exhibits the drifts are not shown. It does not appear in the evidence how many trains had passed before the photographs were taken.

It is the popular impression that photographs cannot lie, but those who have had long experience in the trial of lawsuits know very well that although honestly taken and sworn to they may and often do convey very false impressions. It was the duty of the jury, in connection with all the other evidence, to consider the photographs, but they are not controlling upon us.

It has been argued with ability and earnestness by appellant's counsel that there was no credible evidence to warrant the finding of the jury which absolved plaintiff from contributory negligence, and that it is incredible that he did not know or ought not to have known that he was approaching the track of defendant. In considering whether we should set aside the order refusing a new trial there are certain rules of law which are binding upon us. It is settled by a long line of cases in this court, which it is unnecessary to cite, that the burden of proof of contributory negligence is ordinarily on the defendant. It is true that if the jury arrive at a conclusion wholly unwarranted by the evidence or which is very clearly the result of passion or prejudice, so that the court can see that justice has not been done, a new trial may be granted in the discretion of the court.

On the other hand, if the verdict arrived at is one that reasonable men might find, it is not the duty of the court to disturb the decision of fact which the law has confided to juries, not to judges. This court has repeatedly held that if there is any credible evidence to support the verdict it cannot be disturbed, and that the judgment of the trial court

sustaining the verdict should not be set aside unless clearly wrong. *Ellis v. C. & N. W. R. Co.* 167 Wis. 392, 167 N. W. 1048; *Brunner v. M., St. P. & S. S. M. R. Co.* 155 Wis. 253, 266, 143 N. W. 305, 144 N. W. 986; *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 432, 140 N. W. 30; *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 443, 130 N. W. 513; *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425.

In the United States supreme court the rule has been thus stated:

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony or because, the facts being undisputed, fairminded men will honestly draw different conclusions from them." *Richmond & D. R. Co. v. Powers,* 149 U. S. 43, 13 Sup. Ct. 748; *Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770; *Harsen v. N. P. R. Co.* 139 Wis. 186, 120 N. W. 826; *Jurkovic v. C., M. & St. P. R. Co.* 166 Wis. 266, 164 N. W. 993; *Valin v. M. & N. R. Co.* 82 Wis. 1, 5, 51 N. W. 1084.

It would probably seldom happen that a traveler would be excused for not knowing of his approach to a railroad track in broad daylight, and such ignorance would generally defeat a recovery. But the look-and-listen rule is not an unbending rule, but one to be considered in connection with all the facts. There may be ignorance of the fact that there is a railroad track at the place in question; the view may be partially obscured by trees or other objects, or entirely covered by fresh snow as indicated by testimony in this case. It cannot be said as a matter of law that any of these circumstances or all of them would excuse the person injured. Nor are we prepared to say as a matter of law that these and other similar facts are not proper subjects for the consideration of a jury. In the present case the facts that the track was a spur in the outskirts of the city, without fences or

cattle-guards; the testimony that the wind was blowing and the snow drifting; that plaintiff was busily occupied in handling a heavy truck with difficulty, were all facts fairly submitted to the jury, and they found that there was no contributory negligence, and their finding was sustained by the trial court.

In view of the decisions of this court as to the province of the jury and the effect of their decisions on questions of fact, we do not feel justified in reversing the order denying a new trial. We cite a few of the many cases which illustrate that the look-and-listen rule is not an ironclad rule subject to no exceptions or qualifications: *Valin v. M. & N. R. Co.* 82 Wis. 1, 51 N. W. 1084; *Sarles v. C., M. & St. P. R. Co.* 138 Wis. 498, 120 N. W. 232; *Kujawa v. C., M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249; *Gordon v. Ill. Cent. R. Co.* 168 Wis. 244, 169 N. W. 570; *Winchell v. Abbot,* 77 Wis. 371, 46 N. W. 665; *Phillips v. M. & N. R. Co.* 77 Wis. 349, 46 N. W. 543; *Swalm v. N. P. R. Co.* 143 Wis. 442, 128 N. W. 62; *Wade v. C. & N. W. R. Co.* 146 Wis. 99, 130 N. W. 890.

In this connection we may refer to the statute (sub. 6, sec. 1809) which provides that a recovery for personal injury or death caused by the negligent omission of a railway company to comply with the requirements of that section shall not be barred by a slight want of ordinary care contributing to the injury or death. In considering this statute, in the opinion of Mr. Justice ESCHWEILER, it was said:

"With the legislative change as to the amount of care, lack of which will defeat an action for injury to the traveler on the highway at a railroad crossing, there must be a corresponding relaxation of the former rather rigid look-and-listen rule." *Gordon v. Ill. Cent. R. Co.* 168 Wis. 244, 169 N. W. 570.

Appellant's counsel argue that the speed of the train was not the proximate cause of the injury. In some of the cases cited by them the question of proximate cause was not properly submitted to the jury. In others it is held that the neg-

ligence of the plaintiff proximately caused the injury, and in others that in order for the plaintiff to recover he should show that the injury was the natural consequence of the act or omission of the defendant and that a person of ordinary care ought reasonably to have apprehended that personal injury to another might probably result from such negligence.

Appellant's counsel argue that if the engine had been running ten miles per hour under the circumstances in this case the accident was as likely to occur as if the train was running twenty-five miles an hour, and that it could not have been anticipated that the accident would happen. In an opinion of the court by Mr. Justice VINJE it was said:

"It is not necessary that an ordinarily prudent man ought reasonably to have anticipated the particular injury to the plaintiff or to any particular person. It is sufficient that such a man ought reasonably to have anticipated that his conduct might probably cause some injury to another." *Coel v. Green Bay T. Co.* 147 Wis. 229, 238, 133 N. W. 23; *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 120 N. W. 858; *Morey v. Lake Superior T. & T. Co.* 125 Wis. 148, 103 N. W. 271; *Kujawa v. C., M. & St. P. R. Co.* 135 Wis. 562, 116 N. W. 249.

The jury may have believed that there was a causal relation between the speed of the train and the extent of the injury. It is quite probable that if the train had been running more slowly the injury would have been less serious. *Coel v. Green Bay T. Co., supra.*

Although the engineer might not have anticipated the specific injury to the plaintiff, it is reasonable that he should have anticipated that travelers might undertake to cross the track even though a train might be in sight, and that accidents were more likely to happen if the train was running at an illegal than at a legal rate of speed. Under the testimony the jury may have believed that if the train had been going twelve miles an hour or less, the accident would not have happened at all. *Ellis v. C. & N. W. R. Co.* 167 Wis. 392, 402, 167 N. W. 1048.

We are satisfied that the finding of the jury that the want of ordinary care on the part of the defendant was the proximate cause of the injury was correct.

By the Court.—Judgment affirmed.

ROSENBERRY, J., dissents.

A motion for a rehearing was denied, with $25 costs, on January 10, 1922.

PETERS, Appellant, vs. KANZENBACH, Respondent.

October 21, 1921—January 10, 1922.

Principal and agent: Authority of agent to release debtor of principal: Novation: Agent as trustee of express trust.

1. A collection agent who was not authorized to execute a release of a debt which he was attempting to collect from his principal's debtor could not accept the debtor's note payable to himself and discharge the debt. The release, not being consented to by the principal, constituted no valid consideration for the note.
2. In order to constitute a novation the creditor must consent to the discharge of the original debtor and accept the promise of the new debtor.
3. Where a collection agent was given a claim to collect and without authority obtained a note in which it was payee and gave a release to the debtor, its action in this respect not being ratified by its principal, the creditor, it could not bring action on the note as trustee of an express trust under sec. 2607, Stats., without joining the creditor. To warrant the bringing of such an action the creditor must expressly or impliedly have consented thereto, and a situation must also appear whereby the judgment obtained would bind such creditor and release his claim against the debtor.

ESCHWEILER, J., dissents.

APPEAL from a judgment of the circuit court for Columbia county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing the complaint, with costs, judgment having been entered pursuant to a directed verdict.

One A. J. Weir, alleged to be the owner of a valid claim for $60 against the defendant, placed the same in the hands of the plaintiff, a collection agent, for collection. The defendant called upon the plaintiff while the plaintiff had such claim for collection, and entered into an arrangement with him by the terms of which the plaintiff executed and handed to the defendant a receipt in full for said claim and took from the defendant his promissory note for the amount in question, payable to the plaintiff. The action in question is brought by the plaintiff to recover from the defendant on this note. The defendant's answer, among other things, alleged want of consideration for the note. The case was tried upon the issue so formed.

On the trial of the action the note was introduced in evidence, and the foregoing facts were made to appear from plaintiff's evidence. Plaintiff testified that after giving the defendant the receipt he rang up Weir by telephone and informed him of the giving of such receipt and of the execution and acceptance of the note, and stated that he, the plaintiff, would pay Weir. There is no evidence indicating that Weir expressed any satisfaction or dissatisfaction with such arrangement. There is no evidence to show that Weir authorized the plaintiff to deliver the receipt in question to the defendant, or that he authorized the acceptance of a note executed by the defendant to the plaintiff, nor is there any evidence to show that Weir had released the defendant from liability upon his claim against him.

The foregoing substantially represents the entire evidence introduced in the case, and upon the introduction of the same defendant's counsel moved for a directed verdict, which motion the court granted.

William N. Powers of Oshkosh, for the appellant.

For the respondent there was a brief by *C. H. Metzler*,

and oral argument by *Mr. W. H. Farnsworth* and *Mr. Metzler,* both of Portage.

The following opinion was filed November 15, 1921:

DOERFLER, J. In the first place, the plaintiff was not authorized to execute and deliver to the defendant a release such as is referred to above. The defendant was not indebted to the plaintiff, but was indebted to Weir. Weir had not consented to the acceptance by the plaintiff of the note executed by the defendant. Consequently it follows that the release delivered to the defendant was not a binding or valid release, as appears from the evidence, and as a result the note executed to the plaintiff was not executed pursuant to a valid consideration moving from the plaintiff to the defendant. Furthermore, there being no evidence showing that Weir consented to or approved of the arrangement made between the plaintiff and the defendant, Weir still retained his claim against the defendant.

The arrangement entered into between the plaintiff and the defendant did not constitute a novation, for in order to constitute a novation a creditor must have consented to the discharge of the original debtor and have accepted the promise of the new debtor. 29 Cyc. 1132. So that, inasmuch as it appears from the evidence that Weir did not consent to the discharge of defendant (he being the original debtor), and there being no evidence of his acceptance to treat the plaintiff as his debtor, a novation did not result and Weir still retained his original claim against the defendant.

It is argued by plaintiff's counsel that the action was brought by the plaintiff as trustee of an express trust, and that in such an action, under the provisions of sec. 2607, Stats., it was not necessary for the plaintiff to join Weir with him as a party plaintiff, and that the action could properly be prosecuted in plaintiff's name alone.

In order that the plaintiff could bring this action properly in his own name but as trustee of an express trust, it was necessary that Weir either expressly or impliedly consented

to the bringing of such action in that form, and a situation must also appear whereby the judgment obtained would bind Weir and release Weir's claim against the defendant. There is nothing in the evidence which would warrant such a conclusion.

In the case of *Salter v. Krueger,* 65 Wis. 217, 26 N. W. 544, cited in appellant's brief, it appeared that the note and mortgage were given for the aggregate amount of a debt due from one Emery to the defendant, and another debt due from Emery to Ott. Both were taken in the name of the defendant alone. Ott was not mentioned nor referred to in either. He was present, however, and participated in their procurement, but otherwise was not a party to the transaction. The court in that case, as reported in the opinion on page 221, says:

"Evidently Ott constituted the defendant his trustee of an express trust. Sec. 2607, R. S. Assuming the rightful execution of the note and mortgage, then they were both enforceable in the name of the defendant alone without making Ott a party." Citing *Waterman v. C., M. & St. P. R. Co.* 61 Wis. 464, 21 N. W. 611; *Poor v. Guilford,* 6 Seld. (10 N. Y.) 273, 61 Am. Dec. 749; *Johnson v. Catlin,* 27 Vt. 87, 62 Am. Dec. 622.

In the case at bar Weir was not present when the arrangement between the parties to this action was entered into, nor did he consent to the same. It follows, therefore, that Weir, not having released the defendant as his debtor, and not having consented to the delivery of the receipt to the defendant and the acceptance by the plaintiff of the note in question, still retained his claim against the defendant.

The motion for direction of a verdict was therefore properly granted.

By the Court.—Judgment affirmed.

ESCHWEILER, J. (*dissenting*). I cannot agree with the disposition made of this case by the court.

The subject matter of this litigation is a debt of $60 al-

leged to be owing by defendant. If there was such a debt he either owed it to plaintiff by reason of the giving of the note upon which the suit was brought or else to Weir upon the original obligation. These two alternatives could as well and better be disposed of in this action by bringing in Weir as a party than by following the practice now silently approved by the majority opinion. If the action had been brought by Weir and the fact of the giving of the note to plaintiff had appeared, then plaintiff should have been made a party, and for the same reasons in this case, the possible interest of Weir appearing, he should have been made a party.

Such procedure would be following the direct legislative command of sec. 2610, Stats., which, if not absolutely mandatory upon the courts, is certainly directory with emphasis. It provides that when a complete determination of the controversy cannot be had without the presence of other parties, or any persons not then parties to the action have such interests in the subject matter of the controversy as require them to be made parties for their due protection, the court *shall* order them to be brought in. Such a course as pointed out by this statute has been repeatedly spoken of by this court as being one to be encouraged rather than discouraged. It was so held where a question of possible novation arose as in the case at bar. *Hemenway v. Beecher,* 139 Wis. 399, 402, 121 N. W. 150. The broad powers intended to be given thereby and the consequent duty resting upon the court are discussed and pointed out in *Swanby v. Northern State Bank,* 150 Wis. 572, 576, 137 N. W. 763; and in *Burkhardt M. & E. P. Co. v. Hudson,* 162 Wis. 361, 367, 156 N. W. 1011; *Lumbermen's Nat. Bank v. Corrigan,* 167 Wis. 82, 86, 166 N. W. 650; *Miley v. Heaney,* 163 Wis. 134, 140, 157 N. W. 515; *Brovan v. Kyle,* 166 Wis. 347, 350, 165 N. W. 382.

Where such steps have not been taken by the trial court they may be directed by this court. *Williams v. Thrall,* 167

Wis. 410, 416, 167 N. W. 825. I think, therefore, that such direction should have been given here rather than to affirm the judgment below.

A motion for a rehearing was denied, with $25 costs, on January 10, 1922.

McGOUGH, Appellant, vs. HOGAN, imp., Respondent.

October 21, 1921—January 10, 1922.

Insurance: Benefit societies: Right to require certain relationship between insured and beneficiary: By-laws: Change of beneficiary: Waiver of requirement as to relationship: Void certificate: Effect on existing certificate.

1. Though both the Illinois statute under which a benefit society was incorporated and its charter authorized it to issue certificates in favor of blood relations of an insured, the society, by a by-law, could restrict those who might be designated as beneficiaries to certain blood relations and exclude cousins other than first cousins.
2. A valid by-law of a benefit society specifying those who might be designated as beneficiaries became a part of any contract of insurance evidenced by a certificate, whether so expressed or not.
3. The right of one insured by a benefit society to change the beneficiary without the consent of the latter must be exercised in accordance with the by-laws of the society specifying those who may be designated as beneficiaries, and especially since sub. 5, sec. 1957, Stats., authorizes a change of beneficiary by complying with the by-laws of the society.
4. Where a benefit society whose by-laws excluded cousins other than first cousins as permissible beneficiaries made inquiry as to the relationship of the insured and the proposed beneficiary before issuing a certificate upon a change of beneficiary, but was mistakenly or falsely informed that the person designated was a first cousin, and, when sued after the death of the insured, paid the money into court as authorized by its by-laws and alleged that it would not have issued the certificate had it known that the person designated as beneficiary was a second cousin, there was no waiver or estoppel.

5. Under by-laws of a benefit society providing for a change of beneficiary by the surrender of the old and the issuing of a new certificate, and that the issuing of such new certificate should cancel any previous certificate, the surrender of the old certificate did not cancel it and render it void where the new certificate was invalid because designating a beneficiary not permitted by the by-laws; and the prior designation remained in full force and effect.

APPEAL from an order of the circuit court for Eau Claire county: E. C. HIGBEE, Judge. *Affirmed.*

The plaintiff was a second cousin of Annie O'Donnell, who for a number of years prior to her death had been insured by the defendant Women's Catholic Order of Foresters, having made several changes of beneficiaries. On January 6, 1920, the respondent, *Laura Hogan,* a niece of the insured, was the beneficiary in the then certificate, and on that day that certificate was surrendered by the insured and application made by her to have a new certificate issued in lieu thereof in which the plaintiff should be designated as beneficiary. Such new certificate was delivered to and accepted by Annie O'Donnell about March 2, 1920. She died April 14, 1920. Immediately thereafter the respondent, *Laura Hogan,* notified the defendant order of her claim to the amount on such insurance contract on the ground that the certificate issued in January, 1920, to the plaintiff was not valid, the plaintiff making claim to the same fund. This action was then commenced by plaintiff. Thereupon the insurance company answered and prayed to be allowed to pay into court the amount of the insurance, less costs and sundry items, as provided for in its by-laws.

The plaintiff, in addition to claiming the amount of the insurance policy, also prayed to have from the respondent. *Laura Hogan,* the amount deducted from the insurance fund by the insurance company in its offer of payment into court.

By cross-complaint the respondent, *Laura Hogan,* disputed plaintiff's claim and asserted hers to the insurance fund, and made a similar claim against the plaintiff for the amount deducted by such insurance company.

The pleadings herein set forth certain by-laws of the insurance company in existence at the time of its issuing the last certificate, and among such are the following:

Sec. 128, providing for the surrender of the old and the issuing of a new certificate "payable to such beneficiary or beneficiaries as such member may direct, in accordance with the laws of the order."

Sec. 132, that the issuing of such new certificate shall cancel and render null and void any previous certificate.

Sec. 124. "The certificate shall be construed, and the rights of the order, the member, and the beneficiary shall be determined, according to the laws of the state of Illinois."

Sec. 125, that any false or fraudulent statement shall make null and void a certificate issued.

It further appeared from the cross-complaint of the respondent and the answer of the defendant company that prior to the issuance of the policy in question inquiry was made of the insured as to the exact relationship between herself and plaintiff and that the company was assured by said insured that the plaintiff was her first cousin, and the company also alleged that had it known at the time of the issuance of the certificate that the plaintiff was a second instead of a first cousin the certificate would not have been issued.

The trial court overruled the plaintiff's demurrer to so much of the answer of the respondent as in effect asserted that the plaintiff's certificate of insurance was invalid as having been issued in violation of the society's by-laws. From the order overruling such demurrer the plaintiff has appealed.

Fred Arnold of Eau Claire, for the appellant.

For the respondent there were briefs by *Hannan, Johnson & Goldschmidt* of Milwaukee, and oral argument by *Timothy J. Hannan.*

The following opinion was filed November 15, 1921:

ESCHWEILER, J. At the time of the issuing of the policy in which plaintiff was designated as beneficiary and de-

scribed as a cousin of the insured, sec. 127 of the by-laws of the society provided for the classes to whom death benefits should be made payable, designating, among others, "(8) cousins in the first degree." It is practically conceded in this case that plaintiff, though a "blood relation" and a cousin of the insured, was not, being a second cousin, within the class covered by the phrase in that by-law.

The plaintiff contends that inasmuch as the Illinois statute under which the defendant benefit society was incorporated and its charter as well specifically authorize it to issue certificates in favor of and to pay benefits to "blood relations" of an insured, it cannot enact or enforce such a provision as found in sec. 127 of its by-laws, just above quoted, in so far as the provision of the by-law attempts to limit the field of "blood relations" to cousins in the first degree only, at least in the face of a certificate such as was issued here.

The by-law in question, however, is a self-imposed restriction upon, and not an attempted enlargement of, the power granted the benefit society by the statute of Illinois and its charter thereunder. Such power thus granted marks the limit beyond which it cannot go, but it by no means follows that thereby is also determined the extent to which it must go. So far it has the right to go, but there is no legal command upon it that it must go that far. That being so, we can see no valid objection to its curtailing, by its own choice and through such a by-law, the field within which it elects to exercise such a grant of power. *Murphy v. Nowak,* 223 Ill. 301, 312, 79 N. E. 112, 7 L. R. A. N. S. 393; *Women's Catholic Order of Foresters v. Heffernan,* 283 Ill. 429, 435, 119 N. E. 426. The precise situation and relationship here presented was involved and a similar decision reached in *Rizzo v. Catholic Order of Foresters,* 176 Ill. App. 165, following *Flannery v. Gleason,* 133 Ill. App. 398, 406.

The earlier Illinois case of *Wallace v. Madden,* 168 Ill. 356, 48 N. E. 181, holding the contrary, and which was relied upon by plaintiff, is plainly overruled by the subsequent cases in that state.

This being, therefore, a valid by-law, it became a part of any contract of insurance with an insured evidenced by its certificate whether so expressed or not. *Hayden v. Women's Catholic Order of Foresters,* 167 Wis. 437, 167 N. W. 812; *Malancy v. Malancy,* 165 Wis. 642, 645, 163 N. W. 186; *Thomas v. Covert,* 126 Wis. 593, 596, 105 N. W. 922. The appointment of the plaintiff was therefore unauthorized. *Severa v. Beranak,* 138 Wis. 144, 119 N. W. 814.

The undoubted right under the law of this state of such an insured to change the beneficiary without the consent of such beneficiary must nevertheless be exercised in accordance with the by-laws of such society. *Dean v. Dean,* 162 Wis. 303, 156 N. W. 135; *Suelflow v. Supreme Lodge K. & L. of H.* 165 Wis. 291, 295, 162 N. W. 346, and cases cited in each; *Murphy v. Nowak,* 223 Ill. 301, 308, 79 N. E. 112, 7 L. R. A. N. S. 393.

This is the rule evidently recognized and codified by the provision of sub. 5, sec. 1957, Stats., expressly providing that as to such societies as the insurer here, a change of beneficiaries without the consent of the beneficiary may be had by the insured "by complying with the by-laws of the society, order, or association which issued the same." *Ormond v. McKinley,* 163 Wis. 205, 207, 157 N. W. 786; *Malancy v. Malancy,* 165 Wis. 642, 163 N. W. 186.

It appears from the pleadings here, as presented upon demurrer, that inquiry was made of the insured as to the exact relationship existing between herself and the plaintiff and that such inquiry was answered by the insured, mistakenly or falsely—and it is immaterial which,—that the plaintiff was a first cousin, instead of stating the real fact that he was a second cousin; and it is also further alleged that, if the true fact had been known, the policy making the plaintiff beneficiary would not have been issued. Such misstatement of a material fact evidently could have been successfully urged as a defense by the benefit society in an action in which plaintiff alone was concerned. *Koerts v. Grand Lodge Hermann's Sons,* 119 Wis. 520, 525, 97 N. W. 163;

Wilhelm v. Columbian Knights, 149 Wis. 585, 588, 136 N. W. 160; *Hanf v. Northwestern M. A. Asso.* 76 Wis. 450, 45 N. W. 315.

Under the state of facts disclosed here, the situation is materially different from that where such a society enters into a contract of insurance by the issuing of a certificate which is known by the society when issued to be in violation of or inconsistent with its by-laws, as in such cases as *Bruger v. Princeton & St. Marie M. F. Ins. Co.* 129 Wis. 281, 290, 109 N. W. 95; or where there is inserted a provision against liability for suicide, though not authorized by any by-laws, yet is not in violation of its charter, and being accepted by the insured becomes binding upon him, as in *McCoy v. Northwestern Mut. R. Asso.* 92 Wis. 577, 584, 66 N. W. 697; or where the designation of beneficiary is not in the prescribed manner, as in *Ledebuhr v. Wis. T. Co.* 112 Wis. 657, 662, 88 N. W. 607.

The benefit society reserved to itself, by the terms of a by-law in force at the time of the issuing of this policy, the right to do exactly as it did in this particular case, of paying the money, less proper deductions, into court wherever conflicting claims are made to the insurance fund, even though conflicting certificates have been issued by the society. Having alleged as here that plaintiff's certificate would not have been issued if the fact were known of the real relationship, no question is here presented of any possible waiver or estoppel. *Faubel v. Eckhart,* 151 Wis. 155, 159, 138 N. W. 615; *Grand Lodge A. O. U. W. v. Ehlman,* 246 Ill. 555, 558, 92 N. E. 962; *Royal Arcanum v. McKnight,* 238 Ill. 349, 356, 87 N. E. 299; 2 Joyce, Ins. (2d ed.) § 746.

Under the express provisions of the by-laws of the defendant society and which are but in accord with well recognized principles of law, the mere surrender of the certificate in which the defendant *Laura Hogan* was designated as beneficiary did not thereby cancel and make it void unless and except a valid and effectual new certificate was issued

in lieu thereof. In default of the issuing of a valid certificate to the plaintiff, the prior designation of *Laura Hogan* as the beneficiary remained in full force and effect. *Smith v. Boston & M. R. R. Asso.* 168 Mass. 213, 46 N. E. 626, and cases cited; *Royal League v. Shields,* 251 Ill. 250, 96 N. E. 45; *Elliott v. U. S.* 271 Fed. 1001, 1006.

It follows, therefore, that the conclusion arrived at by the trial court was correct, that the policy issued to plaintiff under the facts set forth in the pleadings was null and void, and the prior certificate to the defendant *Laura Hogan* remained in full force and effect at the time of the death of the insured, and that other questions raised on this appeal need not be discussed or determined.

By the Court.—Order affirmed.

A motion for a rehearing was denied, with $25 costs, on January 10, 1922.

SCHMIDT, Administratrix, Appellant, vs. WISCONSIN SUGAR COMPANY, imp., Respondent.

December 13, 1921—January 10, 1922.

Master and servant: Minor in dangerous employment: Driving automobile: Collision with railroad train: Proximate cause: Pleading.

1. The employment of a boy about twelve years old by a corporation to act as chauffeur for one of its adult employees using an automobile is not an "employment dangerous to life or limb" forbidden by sub. 2 (c) (23), sec. 1728*a*, Stats., so as to make the employer liable for his death from injuries sustained in a collision between the automobile and a railroad train.
2. To recover on a claim of liability for injury consequent upon a violation of a penal statute there must be some causal connection between such violation and the particular injury.
3. Where such causal connection is clear from the facts stated and proved it is for the court, but when not clear it may be a question for the jury.

4. Allegations in a complaint that there was a violation of sec. 1728*a*, Stats., and that injury to and the death of a minor was proximately caused by such violation, are conclusions rather than statements of essential facts.

OWEN, J., dissents.

APPEAL from an order of the circuit court for Milwaukee county: GUSTAVE G. GEHRZ, Circuit Judge. *Affirmed.*

The plaintiff was the mother and subsequently appointed administratrix of the estate of one Fred S. Schmidt, who was on June 21, 1919, just under twelve years of age and on that day killed by a collision between an automobile he was then driving and a passenger train on a highway in Milwaukee county. The defendant Walter Schmidt is administrator of the estate of one John Schmidt, deceased, who was in the automobile at the same time, but such defendant is not concerned with this appeal.

The respondent defendant is a Wisconsin corporation.

The complaint purports to set forth one cause of action arising under secs. 4253 and 4254, Stats., the survival statutes, for the damages accruing to the estate of the minor by reason of the injuries arising from such accident; and a second under secs. 4255 and 4256, for the pecuniary loss by reason of such death to his surviving parents, with whom he lived and for whom he rendered services.

The other allegations of the complaint deemed material here are as follows:

That during the week preceding his death the said Fred S. Schmidt was in the employment of the said John Schmidt, deceased, and the said *Wisconsin Sugar Company* in and about the operation of a Ford automobile in the capacity of chauffeur to the said John Schmidt; that such employment as to the said Fred S. Schmidt was dangerous to life and limb and in contravention of sec. 1728*a*, Stats.; that on said June 21, 1919, while employed as aforesaid and, as plaintiff is informed and believes, while the said John Schmidt was engaged in the discharge of his duties as an employee

of the said *Wisconsin Sugar Company,* the said automobile, while then and there being operated as aforesaid by the said Fred S. Schmidt, was struck by the said passenger train; that Fred S. Schmidt suffered a fracture of the skull as a result of the said collision, from which he died a few minutes thereafter; that such injury and death was proximately caused by the unlawful employment aforesaid.

The trial court sustained a general demurrer of the respondent to such complaint on the ground that it appears upon the face thereof that it did not state facts sufficient to constitute a cause of action. From an order to that effect the plaintiff has appealed.

The cause was submitted for the appellant on the brief of *A. W. Schutz* of Milwaukee, and for the respondent on that of *E. L. McIntyre* and *Harvey M. Burns,* both of Milwaukee.

ESCHWEILER, J. Giving this complaint the most liberal construction to which it is entitled under our rules, it must nevertheless be held that it fails to state sufficient facts upon which a legal conclusion could be based that there was by defendant (respondent here) any unlawful employment of Fred S. Schmidt, a minor, so that the accident in question could create a liability on its part for either of the alleged causes of action. This view makes it unnecessary to pass upon any other question presented on this appeal.

Assuming, but only for the present purpose, that the complaint sufficiently states an employment of the minor by the respondent at the time of the accident, the only allegations in this complaint upon which either of the causes of action attempted to be set forth could be predicated are in substance these, namely: that such driving of the automobile at the time in question was an employment dangerous to life and limb and in contravention of sec. 1728*a*, Stats.; and secondly, that such injury resulting in his death a few minutes thereafter was proximately caused by such alleged un-

lawful employment. No other statements are made or facts alleged indicating what particular one of the many provisions of sec. 1728*a*, Stats., it is claimed defendant violated, nor is any such satisfactorily pointed out to us by appellant on the argument, nor can we find any that would bring the situation as presented by the complaint within any of its particular terms.

Sec. 1728*a*, Stats., found in ch. 83, entitled "Hours of Labor and Employment of Children, and Boards of Arbitration," provides by sub. 1 that written permits shall be obtained for the employment of children between the ages of fourteen and seventeen years in certain specified occupations, or at any gainful occupation or employment, directly or indirectly. Sub. 2 prohibits the employing, requiring, permitting, or suffering of any minor to work in any place of employment or at any employment dangerous or prejudicial to the life, health, safety, or welfare of such minor or other employee. It also provides that it is the duty of the industrial commission to determine and fix reasonable classifications of employments and places of employment for minors and females and to issue general or special orders regarding the same. It then provides that until such commission shall, after investigation, so determine as to other employments and places of employment, those on a certain specified list are declared to be deemed dangerous or prejudicial to the life, safety, health, or welfare of minors under certain specified ages, or of females. Then follows the schedule of such employments or places of employment declared to be dangerous or prejudicial. For instance, sub. (a), employment during the nighttime in the delivery of messages for telegraph companies or of goods of any minor under twenty-one years of age; sub. (b), excluding the employment of all minors under eighteen years of age in a numbered list of thirteen specific employments, including, for example, blast furnaces, the running of elevators, explosives, matches, quarries, or mines, railroads, etc.; sub.

(c), excluding minors under sixteen years of age in a list of at least twenty-two specified employments, including, for example, bakeries, bowling alleys, boilers, and a varied number of machines, paints, or poisons, theaters, concert halls, tobacco warehouses, etc.; and ending with sub. (23) relied upon by appellant and reading as follows: "Any other employment dangerous to life or limb, injurious to the health, or depraving to the morals."

But nowhere do we find any specific provision declaring expressly, nor, so far as we can see, by implication even, that the driving of an automobile is considered by the legislature as dangerous or hazardous either as an occupation by itself or as a place of employment.

To uphold this complaint as stating a cause of action it is evident that we would be required to say that it is covered by and included with the general language of sub. (23) just above quoted. This we do not feel prepared to say.

This court has said in *Steffen v. McNaughton,* 142 Wis. 49, 52, 124 N. W. 1016, 26 L. R. A. N. S. 382, that the automobile as a vehicle cannot be placed in the category of instrumentalities like locomotives or such a substance as dynamite or other dangerous contrivances and agencies, citing a number of cases from other jurisdictions, to which list may be added *Daily v. Maxwell,* 152 Mo. App. 415, 423, 133 S. W. 351; *Neubrand v. Kraft,* 169 Iowa, 444, 151 N. W. 455, L. R. A. 1915D, 691, note. In the chapter on police regulations as to the use of the highways, sec. 1636—49, Stats., makes it unlawful for a person under the age of sixteen, unless accompanied by parent, guardian, or other adult person, to operate or drive any automobile upon the public highway, inferentially lending support to the view that the legislature did not intend to absolutely prohibit or make unlawful the driving of such vehicles by minors under sixteen when accompanied by some older person, the conceded situation here.

That other states have expressly classified the driving of

such machines as a hazardous or dangerous employment does not persuade us that we should now read into the general language of said sub. (23), *supra,* by implication or construction, such a broad field of employment or places of employment as would necessarily have to be done to include the driving of automobiles. For instance, in New York under their workmen's compensation law (Civil Code, sec. 2032), which provides for payment for injuries sustained or death incurred by employees engaged in "the following hazardous employments," many separate groups being specified, including many such as are found detailed in our sec. 1728*a,* and in their group 41 is included "operation, otherwise than on tracks, on streets, highways, . . . engines propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses." Cases based, therefore, upon such express statutory provisions as are cited by appellant from New York and other jurisdictions are inapplicable here. A list of such cases is found in L. R. A. 1918F, 234.

In all cases such as are here presented based upon a claim of liability for injury consequent upon some violation of a penal statute, there must be some causal connection between such violation and the particular injury. Where the causal connection is clear from the facts stated and proven, it is for the court; when not clear, it may be a question for the jury. *Haswell v. Reuter,* 171 Wis. 228, 233, 177 N. W. 8. See, also, *Benesch v. Pagel,* 171 Wis. 620, 177 N. W. 861; *Steinkrause v. Eckstein,* 170 Wis. 487, 490, 175 N. W. 988; *Pizzo v. Wiemann,* 149 Wis. 235, 239, 134 N. W. 899, 38 L. R. A. N. S. 678; note in L. R. A. 1915E, 516.

The language in the complaint to the effect that there was a violation of sec. 1728*a,* Stats., and that the injury to and death of the minor was proximately caused by such violation, are but conclusions of the pleader rather than the statement of essential facts. *Emond v. Kimberly-Clark Co.* 159 Wis. 83, 86, 149 N. W. 760; *Herrem v. Konz,* 165 Wis. 574, 576, 162 N. W. 654; *Howard v. Redden,* 93 Conn. 604, 107 Atl. 509.

Upon the complaint as it is presented, therefore, the trial court was right in holding that it was insufficient and properly sustained the demurrer.

By the Court.—Order affirmed.

OWEN, J. (*dissenting*). I think the complaint sufficiently alleges that Fred S. Schmidt was employed by the *Wisconsin Sugar Company* to act as chauffeur for John Schmidt, an employee of the *Wisconsin Sugar Company,* whose employment by the company required the use of an automobile which, together with the chauffeur, was furnished by the company, and the only question arising is whether the employment is dangerous to life or limb. If so, it is condemned by sec. 1728*a,* Stats., and the employer is liable for the damages proximately resulting from such employment.

It is held in the opinion of the court that service as chauffeur of an automobile is a safe employment for a boy eleven years old as a matter of law. To this I cannot subscribe. It readily may be conceded that a passive automobile is a harmless instrumentality, and that it is not a dangerous agency when operated by a careful and competent driver. Its safe operation, however, demands care, caution, judgment, prudence, skill, and alertness,—attributes which are not fully developed in children eleven years of age. When an automobile is operated by a careless and incompetent person, it is a matter of common knowledge that it is a source of danger not only to the occupants but to others in the highway. Accidents resulting from the careless use of automobiles are of daily occurrence. Their use is the subject of comprehensive police regulations in every state and city, and additional regulations, including the licensing of those who operate them, are continually suggested. Without statistics at hand, I hazard the assertion that they are responsible for a greater loss of life and for more personal injuries than are railroad trains, electric currents, high explosives, or any other one agency. Whether this be true or not, it is certain that

accidents resulting from their use causing personal injuries are of such frequent occurrence that they scarcely excite comment. I do not think it can be said as a matter of law that their operation is a safe employment for a boy eleven years of age.

It seems to be assumed in the opinion that, because such employment is not specifically condemned by sec. 1728*a*, the legislature evidently regards such service as a safe employment. I think this assumption entirely unwarranted. There is no attempt made in sec. 1728*a* to enumerate every unsafe employment. If this were true, there would be no occasion for the language of sub. (23) prohibiting "any other employment dangerous to life or limb." The fact that other states have specifically prohibited such employment is indicative of at least a divided public opinion upon that question, which makes it rather hazardous for a court to say that such an employment is not unsafe. Neither is the fact that the legislature refrained from prescribing criminal punishment for an infant under sixteen years of age for driving an automobile, when accompanied by an adult, tantamount to an assertion that it is a safe employment for boys of whatever age. Sec. 2394—48 requires every employer to furnish employment which shall be safe for the employees therein.

It has been held by this court that whether such employment is safe is a jury question. *Van de Zande v. C. & N. W. R. Co.* 168 Wis. 628, 170 N. W. 259, and cases there cited. The same rule should obtain under the statute here in question, and I do not understand that the court holds that whether a given employment offends against the statute under consideration may not give rise to a jury question. In my opinion the demurrer should have been overruled and the plaintiff given the opportunity for making proof of the allegation of the complaint.

WATERS and another, Receivers, Appellants, vs. BECKER, Respondent.

December 13, 1921—January 10, 1922.

Carriers: Excessive freight charges: Rights of parties: Demurrage: Conversion: Damages: Unpaid freight: Reconsignments: Reasonableness and validity of regulations: Jurisdiction of interstate commerce commission and of state court.

1. Where the initial carrier of a shipment of coal quoted the same rate charged by other carriers, but on arrival of the coal at its destination it was discovered that the carrier had never published such rate, and that the rate according to the tariff in force was larger, the consignee was under no obligation to accept the coal and pay the illegal rate and afterwards seek his remedy.
2. The fact that a bill of lading covered a shipment of coal and gave the carrier the right to make a reasonable charge for storage of property not removed within forty-eight hours, gave it no right to hold the coal in the cars for six months after the consignee refused to accept it and charge storage therefor, where the refusal to accept was due to an excessive freight rate.
3. In determining the damages for the conversion of shipments of coal by the carrier, the freight charges, when unpaid, should be deducted from the fair market value of the coal at the point of destination, this fully compensating the shipper, who should not be permitted to profit because the contract was not performed. If the freight has been paid the amount should be included as part of the damages.
4. The interstate commerce commission having jurisdiction over the tariff regulations and practices relating to reconsignments, the circuit court had no jurisdiction to determine a claim of the consignee for conversion when the validity of the claim was dependent upon whether or not a regulation of the carrier as to reconsignments was proper.
5. The carrier's claims for demurrage charges accruing on coal accumulating at a certain point, as the result of a dispute over the validity of an order affecting the consignee's reconsignment rights, having been submitted to the interstate commerce commission, were not within the jurisdiction of the state circuit court.
6. Under sec. 9 of the Interstate Commerce Act (4 Fed. Stats, Ann. (2d ed.) p. 432), where the consignee invoked the jurisdiction of the interstate commerce commission respecting the

interpretation and validity of a carrier's tariffs relating to reconsignments, charges for demurrage, and reconsignment and reparation claims, and the commission passed on most of the questions but had never made any final order of reparation or determination of the amount to be paid, the consignee had elected his remedy and could not thereafter bring action in the circuit court to recover demurrage and reconsignment charges claimed to have been illegally collected.

7. The consignee having submitted the question of damages for delay in delivery due to a dispute over his reconsignment rights to the interstate commerce commission, which held that he had failed to use due diligence to avoid loss and could not properly be awarded damages for his loss, was, under secs. 8 and 16 of the Interstate Commerce Act (4 Fed. Stats. Ann. (2d ed.) pp. 430, 475), bound by his election in choosing the commission as the forum for relief, and could not bring action in the state circuit court to recover such damages.

APPEAL from a judgment of the circuit court for Milwaukee county: E. T. FAIRCHILD, Circuit Judge. *Affirmed in part; reversed in part.*

This is an appeal by the plaintiffs, *Dudley E. Waters* and *Frank W. Blair,* as receivers of the Pere Marquette Railroad Company, from a judgment for $12,442.13, damages awarded to defendant on his counterclaims.

The pleadings include four causes of action and seven counterclaims, of which the third cause of action, the first, third, and fourth counterclaims are involved in this appeal.

For the appellants there were briefs by *Van Dyke, Shaw, Muskat & Van Dyke* of Milwaukee, and oral argument by *Douglass Van Dyke.*

Thomas H. Gill of Milwaukee, for the respondent.

Third cause of action.

JONES, J. The complaint alleged that defendant caused to be shipped to him at Milwaukee six cars of coal which arrived during the months of October, November, and December, 1914; that although notified repeatedly, defendant refused to receive or reconsign the cars; that since there was no other storage place available the coal was allowed

to remain on the cars until June 10, 1915, on which date plaintiff sold the coal for $594.60 in an effort to collect the lawful charges; and that there remained due to plaintiff for freight and demurrage charges the sum of $1,187.87.

Defendant admitted the shipping of the six cars and explained that his failure to dispose of them was due to a controversy over freight rates with the Baltimore & Ohio Railroad Company, the road upon which the shipment originated. Defendant alleged that it was the duty of the plaintiff to unload and store the coal within a reasonable time after his refusal to accept it; that the sale by plaintiff was a conversion of his property; and that defendant is entitled to damages for this conversion to the amount of the market value of the coal at the time and place of conversion, with interest.

The evidence shows that the cars in question had been shipped by defendant on the Baltimore & Ohio Railroad on its assurance that the rate to Milwaukee over that and plaintiff railroad was the same as upon other lines from the same districts, $2.65 per ton; that upon arrival at Milwaukee it was discovered that the Baltimore & Ohio had failed to publish such tariff; and that the rate, according to the Baltimore & Ohio tariffs then in force, was $2.94 per ton. Defendant tendered payment based on the rate of $2.65 per ton and was refused disposition of the cars. Plaintiff's agent attempted to get a correction of the rate from the Baltimore & Ohio but was unsuccessful, and, after a correspondence with defendant, sold the coal for $2.05 per ton.

The trial court found, in addition to the facts stated, that under the circumstances ten days was a reasonable time in which plaintiff should have unloaded and stored the coal; that demurrage should be charged during such ten-day period at the rate of $1 per day per car; that the total freight was $731.47; and that the amount of coal sold was 300 tons and 1,200 pounds, of the market value of $4.65 per ton at Milwaukee.

He held as matters of law that it is the duty of a carrier, when freight has not been disposed of within a reasonable time, to unload and store the same for account of the owner; that under this rule plaintiff was not entitled to charge demurrage for coal left in the cars beyond a reasonable time; that ten days in this case was a reasonable time in which to unload and store the coal; and that defendant was entitled to damages for the conversion of the coal in accordance with the facts stated above.

In the counterclaims, objections to the jurisdiction of the court were raised. No such question arises in this cause of action.

The trial court found that, when the difference arose as to the freight rate, both the consignee and the reconsignee at once refused to accept the coal. Counsel for the parties disagree on this point, but the record seems to justify the finding. There was testimony tending to show that the agent of plaintiff agreed to rectify the mistake as to the rate, but nothing was accomplished in that direction and the coal was left standing in the cars for several months. It might have been better business management for defendant to accept the coal, pay the illegal rate, and afterward seek his remedy, but it cannot be said that he was under obligation to do so. It certainly was very bad management for the carrier to hold the coal in the cars for so many months and then sell it for about half of the freight and demurrage charges.

Plaintiff's counsel rely on the bill of lading as an agreement justifying their contention. The bill of lading gives to the carrier the right to make a reasonable charge for storage of property not removed within forty-eight hours, and provides for a lien for such charges. But we do not construe the contract as one which gives the carrier the right to charge storage for an indefinite and unreasonable time when the refusal of the consignee to accept is due to a rate conceded to be excessive. Neither the interests of the par-

ties nor those of the public are promoted by using cars as warehouses for six months at a time.

It is urged by plaintiff's counsel that if the carrier had unloaded and stored the coal it would have caused some degradation. This is doubtless true, but if plaintiff had used due care in so doing the loss would have been the loss of defendant.

The plaintiff after holding the coal in its cars for several months concluded to sell it, with the result already stated. No good reason is shown why the plaintiff might not have taken steps to relieve the situation at an early date when it was known that defendant would not accept the shipment; thus the loss would have been greatly minimized if not avoided.

Plaintiff's counsel cite cases sustaining charges for demurrage pending disputes as to proper freight rates, in some instances for considerable periods of time. It will serve no good purpose to discuss these cases for the reason that the facts differ so materially.

In view of the peculiar facts of this case and plaintiff's long delay to act after knowledge of defendant's refusal to accept the coal, we do not find that there is any clear preponderance of evidence against the findings of the trial court in this cause of action, and the judgment in respect to it is affirmed.

First counterclaim.

Defendant alleged that between May 17, 1911, and January 1, 1914, plaintiff converted upwards of 2,300 tons of coal in its possession for delivery to defendant, six of these cars being those mentioned in the third cause of action. Certain of these cars were eliminated at the trial. With the exception of seven, plaintiff admitted the conversion of the others, and by way of setoff claimed $480 alleged to be due as demurrage on eight of the cars converted at Ludington, Michigan. The material facts respecting the claims in controversy are as follows:

Milwaukee is the western terminus of plaintiff railroad. Coal is received by plaintiff from Eastern lines at Toledo, Ohio, transported to Ludington, Michigan, on its rails, and thence across the lake to Milwaukee on car-ferries. There are two rates to Milwaukee: the local rate for coal used in Milwaukee, and a lower through rate for coal going beyond.

Defendant had no storage yards, but shipped large amounts of "free coal" to be sold and reconsigned in transit. To facilitate such reconsignment and to advise the carrier that the coal was entitled to the through rate, the coal dealers were instructed to bill the coal to some point beyond Milwaukee, and the coal so billed would be held at Ludington, Michigan, for reconsignment. In 1910 plaintiff instructed defendant to use Elm Grove, a station a short distance beyond Milwaukee on the line of the Chicago, Milwaukee & St. Paul Railway Company, as such blind billing point. It appears that for some years coal billed in this manner was in fact taken to Milwaukee and there reconsigned instead of being held at Ludington for reconsignment.

On October 10, 1912, plaintiff notified defendant that unless he desired his coal held at Ludington for reconsignment, all coal billed to Elm Grove would come forward to Milwaukee to be turned over to the St. Paul road unless other disposition had been ordered previous to its arrival at Ludington. In the same letter plaintiff stated it would notify defendant when his cars passed Toledo, and that defendant should telephone his reconsignment orders to the agent at Milwaukee and also confirm the orders by letter to the agent of the St. Paul road at Milwaukee. On November 15, 1912, plaintiff advised defendant that cars billed to Elm Grove would be delivered at Milwaukee to the St. Paul road and that arrangements should be made with that company to prevent the coal being shipped as billed.

Defendant protested against the orders requiring him to reconsign prior to the arrival of the cars at Ludington, and insisted that he had a right to this service at Milwaukee.

He gave notice of his intention to take the matter before the interstate commerce commission.

During the pendency of this dispute a large number of cars accumulated at Ludington. Some of these were taken over by plaintiff and used as fuel. Others, after a long delay, were brought forward to Milwaukee and disposed of by defendant.

After November 15, 1912, seven cars billed to Elm Grove were delivered by plaintiff to the Chicago, Milwaukee & St. Paul Railway Company at Milwaukee and by it taken to Elm Grove. Defendant alleged this to be a conversion, claiming that the cars should have been held at Milwaukee for reconsignment. Plaintiff contended that proper passing notices had been given, and that defendant had failed to reconsign or order the cars held at Ludington, and that as a consequence the cars were delivered in accordance with plaintiff's stated rules.

The trial court held that there was a conversion of the seven cars, the value of the coal being $5.50 per ton, including the freight rate, $2.05 per ton. He refused to allow plaintiff's claim for $480 demurrage charges.

Plaintiff admits the conversion of a large amount of coal and that defendant is entitled to judgment for its value less the freight and less a setoff of $480 claimed as demurrage which was charged at Ludington. The only matters remaining to be disposed of in this counterclaim are (1) the measure of damages for the coal plaintiff admits having converted; (2) the jurisdiction of the court of the claim that cars were converted at Elm Grove; and (3) the jurisdiction of the court as to plaintiff's claim for demurrage accruing at Ludington.

(1) *Measure of damages.*

The trial court found as a conclusion of law:

"That the rule of damages in this state for the conversion of defendant's coal by the plaintiffs as found is the fair mar-

ket value of such coal at Milwaukee, at the time it should have arrived there, less the lawful freight charges, with interest on such sum at the rate of six per cent. per annum from the date of the taking to the date of the judgment of this court."

Defendant takes exception to this rule of damages and contends for the fair market value of the coal at the proper point of destination, including the freight charges, although they have not been paid. Defendant's counsel does not claim that exemplary damages should be awarded for the conversion of the coal. The reasons given by the railroad company for such conversion are that there were pending differences concerning freight rates, and a large accumulation of cars at Ludington, where most of the coal was converted, and that in order to prevent heavy charges for demurrage and to keep the tracks clear and the cars in use it was deemed best to use or dispose of the coal. It appears from cases in other states that it is not an uncommon thing for railway companies to thus dispose of or use coal in emergencies. Of course if such action is taken, just compensation must be made to the shipper.

The question whether the carrier is entitled to deduct the freight charges under such facts as are here involved has not been decided in this state. Counsel for defendant have cited *Marshall v. American Exp. Co.* 7 Wis. 1; *Boehrer v. Juergens & Anderson Co.* 133 Wis. 426, 113 N. W. 655; *Sanderson v. Cream City B. Co.* 110 Wis. 618, 86 N. W. 169; and *Ingram v. Rankin,* 47 Wis. 406, 2 N. W. 755. But neither of these cases discusses the rule of damages when a carrier has converted the goods and the deduction of freight is claimed.

Counsel for appellants cite *Hammer v. Schœnfelder,* 47 Wis. 455, 2 N. W. 1129, to sustain their contention that compensation for the actual loss of the shipper is the true measure of damages. In other states the great weight of authority is to the effect that the measure of damages for the conversion of goods by a carrier is the same as for their loss

or destruction; that is, their value at the place of destination with interest, less the cost of transportation. 6 Cyc. 531; 3 Sedgwick, Damages (9th ed.) § 844; 3 Hutchinson, Carriers (3d ed.) § 1374; 10 Corp. Jur. p. 403; 4 Ruling Case Law, "Carriers," § 393; *Roth Coal Co. v. L. & N. R. Co.* 142 Tenn. 52, 215 S. W. 404, citing many cases; *Horton v. T. & G. R. Co.* 225 Fed. 406; *Briggs v. B. & L. R. Co.* 6 Allen (88 Mass.) 246; *Wallingford v. Kaiser,* 191 N. Y. 392, 84 N. E. 295.

The reason for the rule is that the shipper is thus fully compensated and should not profit because the contract of carriage has not been performed. By this rule, if the property has increased in value the shipper has the benefit of such increase. Thus the owner has the benefit of the transportation in the same manner as if the goods had been delivered, and it is evidently not just that he should recover as damages the freight which he has not paid. If the owner has paid the freight, of course the amount so paid should be included as part of the damages.

Our conclusion is that the trial court applied the correct rule in ascertaining the measure of damages for coal converted by plaintiff.

(2) *Jurisdiction of the circuit court as to the conversion of Elm Grove cars.*

The trial court filed the following conclusions of law:

"1. That this court has jurisdiction to dispose of all claims of both plaintiffs and defendant, without entry of formal order of the interstate commerce commission fixing the exact amount of the demurrage and reconsignment charges allowed by the commission's order to each party.

"2. That all items of both parties sued upon in this action are in fact common-law liabilities and none of them need for validation the exercise of the administrative or other functions of the interstate commerce commission."

Appellants' counsel insist that the court erred in taking

jurisdiction of the claim relating to the Elm Grove cars. If the railroad company wrongfully caused the cars to be delivered at Elm Grove instead of Milwaukee there was a conversion. If, however, the rule adopted by the railroad company, that the cars after a certain time would be delivered to the places named in the bills of lading, was a proper rule, and if the notices sent the defendant as to the mode in which the cars should be held effective, there was no conversion of the seven cars.

When we come to the third and fourth counterclaims it will appear that both parties to this litigation have assumed that it is within the province of the interstate commerce commission to deal with the tariffs, rules, practices, and regulations which relate to the reconsignment of cars engaged in interstate commerce.

The Interstate Commerce Act makes it the duty of carriers to provide reasonable facilities for operating through routes and make reasonable regulations in respect thereto; to make reasonable regulations for the transportation of goods; to afford all reasonable facilities for the interchange of traffic between their respective lines. The commission is given broad powers, after a hearing, to make its rules as to such regulations and practices.

It seems clear to us that the practice of the railroad company in respect to the reconsignment of the cars in question was within the jurisdiction of the commission. It will be seen that in the third and fourth counterclaims, still to be discussed, there are additional reasons for holding that the circuit court should not have taken jurisdiction of these matters as to the proper reconsignment of cars, but we think that the same principle applies to the Elm Grove cars; and since facts as to these cars also have a bearing on the claims of defendant in the third and fourth counterclaims, it seems best that the whole subject of tariff regulations and practices as to reconsignments should be left to the interstate commerce commission.

(3) *Plaintiff's claim for demurrage.*

In the reply to this counterclaim, plaintiff made claim as a setoff for certain demurrage charges which had accrued at Ludington, as provided in tariffs duly filed and published pursuant to the provisions of the act to regulate commerce. The whole subject of demurrage accruing at Ludington was submitted to the interstate commerce commission and the circuit court had no jurisdiction of the question.

Third counterclaim.

Defendant alleged that by reason of a decision of the interstate commerce commission plaintiff was bound to repay to defendant for reconsignment and demurrage charges unlawfully exacted between October 17, 1912, and December 17, 1912, the sum of $612; that upon the same account for the period from December 18, 1912, to February 9, 1913, the sum of $374 was due and owing; and that for similar unlawful charges from February 9, 1913, to April 10, 1914, the sum of $24 was due and owing.

Plaintiff admitted these items to be recoverable with the exception of $514, but alleged that the interstate commerce commission had exclusive jurisdiction of the matter contained in this counterclaim.

The above claims arose as a result of plaintiff's interpretation of its tariff, under which reconsignment and demurrage charges were exacted for cars held at Ludington as a result of defendant's failure to reconsign them before they reached that point. Two hearings were had before the interstate commerce commission, at which defendant claimed reparation for demurrage and reconsignment charges and general damages for delay in forwarding his cars.

The commission in two decisions laid down rules governing the reconsignment and demurrage charges exacted at Ludington and Milwaukee, but deferred an order of reparation until the parties should submit statement of claims based on the rules so laid down. Defendant presented his

claims, and plaintiff admitted all with the exception of $514. No formal order was ever made. The commission denied defendant's claim for general damages for delay in the forwarding of cars.

The trial court held that the amount of defendant's claims as alleged had been found to be due by the commission and included them in the judgment, stating that the court had jurisdiction regardless of the fact that the commission had made no formal order of reparation.

It will serve no useful purpose to enumerate in detail all the proceedings before the interstate commerce commission in respect to the matters involved in this counterclaim. The proceedings related to the interpretation of tariffs and their validity, charges for demurrage, reconsignment, reparation claims, damages for delay in forwarding cars, and charges of discrimination. Two very elaborate decisions were rendered by the commission. The claims of each party were in part denied and in part sustained. It was claimed in these proceedings that the railroad company had done things prohibited and declared unlawful by the act to regulate commerce and omitted to do other acts required to be done, and that under sec. 8, 4 Fed. Stats. Ann. (2d ed.) p. 430, there was liability for damages sustained.

So far as material, sec. 9 is as follows (24 U. S. Stats. at Large, 382, ch. 104):

Persons damaged may complain to commission, or sue personally. "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Sec. 13, 4 Fed. Stats. Ann. (2d ed.) p. 453, provides for the making of complaints and their investigation by the commission.

Sec. 16, 4 Fed. Stats. Ann. (2d ed.) p. 475, provides:

(A) *Enforcing orders of commission—Payment of money damages.* "That if, after hearing on a complaint made as provided in section 13 of this act, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

It is further provided that if a carrier does not comply with an order for the payment of money within the time limit in such order, the person for whose benefit the order was made may file in the circuit court of the United States, or in any state court having general jurisdiction of the parties, a petition setting forth the causes for which he claims damages, and the order of the commission, and that in such court the findings and order of the commission are to be *prima facie* evidence of the facts therein stated.

When the proceedings were commenced before the interstate commerce commission, it was a case where the practices and mode of doing business of the carrier were attacked as unfair and unreasonable and where the railroad company's interpretation of a tariff was involved. The decision of these questions called for the exercise of the judgment and discretion of the administrative power which is vested by Congress in the commission. *Pennsylvania R. Co. v. Clark Bros. C. M. Co.* 238 U. S. 456, 35 Sup. Ct. 896; *Interstate Comm. Comm. v. Ill. Cent. R. Co.* 215 U. S. 452, 30 Sup. Ct. 155; *Morrisdale C. Co. v. Pennsylvania R. Co.* 230 U. S. 304, 33 Sup. Ct. 938. Until that body had declared the practices to be unjust and unfair, no court had jurisdiction of the subject. *Texas & Pac. R. Co. v. Abilene C. O. Co.* 204 U. S. 426, 27 Sup. Ct. 350; *Pennsylvania R.*

Co. v. Clark Bros. C. M. Co. 238 U. S. 456, 35 Sup. Ct. 896; *Baltimore & O. R. Co. v. U. S. ex rel. Pitcairn C. Co.* 215 U. S. 481, 30 Sup. Ct. 164; *R. J. Darnell, Inc. v. Ill. Cent. R. Co.* 190 Fed. 656.

In *Siggins v. C. & N. W. R. Co.* 153 Wis. 122, 140 N. W. 1128, it was held that where there had been an overcharge for freight on an interstate shipment due to misrouting, the overcharge could not be recovered in an action in the state court for money had and received and that the interstate commerce commission had exclusive jurisdiction of the subject.

Defendant's counsel cite a recent case of this court, *Waukesha G. & E. Co. v. Waukesha M. Co., ante,* p. 420, 184 N. W. 702, which relates to the jurisdiction of the Wisconsin railroad commission, in which it was held that the commission had no jurisdiction to redress grievances arising from past conduct of a utility. In this decision Mr. Justice OWEN referred to the distinction between the interstate commerce act and the Wisconsin statute, and in his quotation from a decision of the supreme court of the United States it is said:

"In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the commission."

There is an additional reason why the circuit court should have refused to take jurisdiction of the subject involved in this counterclaim. The defendant had invoked the jurisdiction of the interstate commerce commission and asked relief in respect to the identical matters now in dispute. After long investigation, the commission passed on most of the questions in issue, but never made any final order of reparation and has never determined the amount to be paid. The commission suggested that the parties should be able to agree as to certain disputed matters and deferred the allowance of reparation. Evidently the parties have not agreed, and

while the proceeding before the commission was pending this action was brought in the state court, and the counterclaims were filed which bring before us the subject of jurisdiction. It seems to us very clear that since defendant elected to pursue his remedy under the federal act he was bound to abide by its terms, including the provisions of sec. 9, above quoted. In *Pennsylvania R. Co. v. Clark Bros. C. M. Co.* 238 U. S. 456 (35 Sup. Ct. 896), the court said (p. 472):

"This is not to say that the finding of the commission as to the amount of damages has any other effect than that prescribed in sec. 16 of the act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the act and not otherwise. The fact that the commission had not made its award of damages is immaterial. The proceeding before the commission was pending and the plaintiff's right and remedy were fixed by the federal act." *Franklin v. P. & R. R. Co.* 203 Fed. 134.

Fourth counterclaim.

Defendant alleged that by reason of plaintiff's delay in the transportation of his coal from Toledo, Ohio, to Milwaukee, Wisconsin, he failed to fill some of his contracts and was later forced to sell his coal on a falling market, sustaining loss in the sum of $2,461.68. This claim embraces seventeen cars delivered to Brookfield and Elm Grove, Wisconsin, without a previous notification to defendant of their arrival at Ludington, and two groups of eight and fifteen cars held by plaintiff at Ludington during the dispute concerning reconsignment rights mentioned in the first and third counterclaims.

Plaintiff replied that as to the cars held pending the dispute the interstate commerce commission had exclusive jurisdiction, and that defendant had presented a claim before that body which had been disallowed and that the claim was *res adjudicata.*

The trial court held that there had been unreasonable delay; that the claim was a common-law cause of action, and found the damages to be as follows: on the seventeen cars, $984.30 with interest from January 4, 1913; on the eight cars, $445.06 with interest from March 1, 1912; on the fifteen cars, $917.46 with interest from March 1, 1913.

The plaintiff claims that there should be deducted from the judgment the sum of $445.06, and interest allowed for the delay in transportation of eight cars, and the sum of $917.46, and interest allowed for a similar delay in the transportation of fifteen cars.

The subject of damages for the delay as to these two groups of cars was submitted by defendant to the interstate commerce commission and fully considered. The commission held that the coal company failed to use due diligence to avoid loss in the matter complained of and that damages could not properly be awarded for such losses, if any, as resulted from the detention of the cars. Defendant's counsel now urge that the remedy of the coal company is a common-law remedy and at any time enforceable in the courts alone.

Secs. 8 and 16 of the Interstate Commerce Act (4 Fed. Stats. Ann. (2d ed.) 430, 475), already quoted, give specifically the right of those claiming to be damaged by the common carrier to make complaint to the commission, and the power is given the commission to make its award of damages and to order payment. Under the construction which has been given to these sections by the United States supreme court, we can see no reason why jurisdiction was not properly taken of the controversy by the commission. *Meeker v. L. V. R. Co.* 236 U. S. 412, 35 Sup. Ct. 328; *Morrisdale C. Co. v. Pennsylvania R. Co.* 230 U. S. 304, 33 Sup. Ct. 938.

According to the authorities cited in this opinion as to the third counterclaim the defendant is bound by his election in choosing the interstate commerce commission as the

forum for relief, and the sums of $445.06 and $917.46, with interest, should be deducted from the judgment.

The judgment of the court in the third cause of action is affirmed.

In defendant's first counterclaim the judgment of the court awarding damages for coal admitted by plaintiff to have been converted is affirmed. The claim for the conversion of the seven Elm Grove cars should be dismissed for the reason that the court had no jurisdiction, and there should be deducted from the judgment the sum of $225.04, with the interest. The plaintiff's setoff claiming demurrage should be disallowed for the reason that the court had no jurisdiction.

The defendant's third counterclaim should be disallowed for the reason that the court had no jurisdiction, and the sum of $1,010 should be deducted from the judgment.

Defendant's counterclaim for delay of eight cars and fifteen cars should be disallowed, and the sums of $445.06 and $917.46, with the interest, should be deducted from the judgment.

By the Court.—Cause remanded, with directions to enter judgment as indicated in this opinion, with costs to appellants.

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ABUSE OF DISCRETION. See DISCRETION.
ACCEPTANCE.
Of goods. See SALES, 20, 21.
Of offer. See VENDOR AND PURCHASER, 1, 2.
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ADVANCEMENTS. See GIFTS.

ADVERSE EXAMINATION.

See INJUNCTION, 1.

How used at trial.

1. While an adverse examination is not a part of the record until offered, the party taking it may offer it, whether the party examined be present or not (sub. 2, sec. 4096, Stats.); and though it cannot be offered by the party whose deposition is taken, it may be used by him when offered as evidence for the other party, as though he were called in rebuttal to testify concerning transactions therein testified to. *Lamberson v. Lamberson,* 398
2. In an action to compel the conveyance by the executor of land deeded to plaintiff by decedent, his father, where plaintiff was fully examined under sec. 4096, Stats., before trial and cross-examined at the trial as to portions of such examination, and defendants made his deposition a part of the record without qualification, plaintiff's testimony therein concerning transactions with deceased became admissible. *Ibid.*

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See NEW TRIAL, 4. TAXATION, 2, 4.

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Questions reviewed: Immaterial questions.

1. In an action against a railroad company for the death of the driver of a taxicab as the result of a collision at a public crossing, where it is shown by undisputed, competent, ad-

missible evidence that the deceased was guilty of a want of ordinary care exceeding a slight want thereof as a matter of law, which proximately contributed to his death, alleged procedural errors will not be considered because they cannot affect the ultimate result of defendant's nonliability. *Rowart v. Kewaunee, G. B. & W. R. Co.* 286

2. Findings not essential to support the judgment may be disregarded. *Lamberson v. Lamberson,* 398

Same: Questions involving discretion of trial court.

3. The action of the trial court in setting aside a verdict for plaintiff and granting a new trial because the verdict was contrary to very persuasive evidence that plaintiff's contract with the defendants was for an entire road-building season for a stated sum, is an exercise of discretion which will not be disturbed on appeal. *Bloomer v. Koepke,* 138

4. Where, in addition to such evidence, defendants admitted, both orally and in writing, that plaintiff was hired for the season, they could not complain that the court granted a new trial and allowed them to go before another jury on the issue. *Ibid.*

5. The granting of a new trial is largely in the discretion of the trial court and will not be disturbed except for cogent reasons. *Welch v. Morton Salt Co.* 415

Harmless or prejudicial error. See APPEAL, 1. FRAUD, 12. LIMITATION OF ACTIONS, 3.

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6. Where the terms of a contract for the sale of land were ambiguous, the findings of the trial court, based on credible evidence, will not be reversed. *Felton v. Stacey,* 471

Affirmance and reversal. See INTERPLEADER. LANDLORD AND TENANT, 2. LIBEL AND SLANDER, 4, 5. NEW TRIAL, 4. RAILROADS, 7, 10. SALES, 18. TAXATION, 2, 4. TRIAL, 1, 5, 6.

Disposition of case: Case tried on wrong theory. See TRIAL, 6.

7. Where plaintiff brought an action of tort because of the false representations of his lessor that a building would be ready for occupancy at a certain date, and after verdict in his favor the trial court directed judgment in favor of the landlord on the theory that the representations were expressions of opinion, the judgment will not be affirmed, but, the plaintiff having proved every element of a valid contract, the case will, under sec. 2836*b*, Stats., be remanded to permit him to amend his complaint so as to change the action to one on contract and for further proceedings in the same action. *Jeleniewski v. Eck,* 497

Appeal from disallowance of claim by municipality. See MUNICIPAL CORPORATIONS, 13, 14. PLEADING, 4.

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Of subscription list. See SUBSCRIPTIONS.

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Revocation of license: Fraud on court.

Where an attorney, applying to the supreme court for admission to practice, represented that he was a practicing attorney in good standing in another state, but the evidence later disclosed that he had been guilty of gross professional misconduct and that proceedings for his disbarment were pending in the state of his former residence, which he evaded by resigning his position as attorney in such state, his license to practice in Wisconsin will be revoked. *Application of State Board of Law Examiners,* 66

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Duty of driver: Sounding of horn: Law of the road.

1. It is the duty of the driver of an automobile to keep a reasonably careful lookout that he may be able to avoid a collision; and the question whether he has fulfilled his duty in regard to watching for pedestrians and other persons is generally for the jury. *Cunnien v. Superior Iron Works Co.* 172
2. While no rule of law requires the driver of an automobile to sound his horn on approaching a street intersection, the statute provides that the automobile be equipped with a suitable horn or signal device; and the purpose of the statute was to enable a driver to give proper warning under any circumstances where such warning would avert an accident. *Ibid.*
3. Where defendant, driving an automobile in broad daylight on a wide, paved street, overtook a dray upon which plaintiff was riding and when the dray stopped turned to the left to pass it, and in passing came unnecessarily so close to the dray as to strike the plaintiff while he was alighting from it, the question of the negligence of the defendant in failing to keep a proper lookout and in not giving warning of his approach is for the jury. *Ibid.*
4. Evidence tending to show that an automobile driver was at the time of an injury to the left of and beyond the center of the street in making a turn to the right, in violation of sec. 1636—49*b*, Stats., is *held* to make the negligence of the driver a question for the jury. *United States C. Co. v. Superior H. Co.* 162

Persons in street: Contributory negligence.

5. Whether plaintiff was contributorily negligent in descending from a dray on the side towards the street and not next to

the curbing and placing one foot down on the pavement without looking for automobiles, is a question for the jury. *Cunnien v. Superior Iron Works Co.* 172

Injuries to invited guests: Liability of driver.

6. The owner of an automobile is not liable for damages to an invited guest riding therein for injuries sustained by the latter, due to the turning over of the machine because of a defective spring, even though it was a second-hand machine and the spring was repaired with old parts. *O'Shea v. Lavoy,* 456

[7. The question as to what degree of negligence in the *management of an automobile* by its owner will make him liable for damages to an invited guest riding therein and sustaining injuries, discussed but not decided.] *Ibid.*

AWARD of industrial commission. See WORKMEN'S COMPENSATION.

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BOND ISSUE. See MORTGAGES.

BOUNDARIES. See FRAUD, 10.

BROKERS.

Necessity of written contract: Recovery on quantum meruit.

1. Although sec. 2305*m*, Stats., provides that agreements to pay commissions for the buying or selling of real estate shall be void unless in writing, the common-law right to recover on *quantum meruit* still remains, and recovery may be had where the owner knowingly accepts and retains the benefits of the broker's services, even though there was no valid written memorandum. *Seifert v. Dirk,* 220

2. To recover on *quantum meruit* the broker must properly plead such cause of action either originally or by amendment. *Ibid.*

Same: Contract involving homestead: Signature of wife.

3. Sec. 2203, Stats., invalidating the alienation of a married man of his homestead without his wife's consent, does not void a contract made by the husband with a real-estate agent to procure a purchaser therefor, and the latter is entitled to his commission when he produces a purchaser ready, able, and willing to buy, even though the wife did not sign such contract and even though the husband knew she would not join in a conveyance of the homestead. *Mackenzie v. Staudenmayer,* 373

Same: Lands outside of Wisconsin.

4. Sec. 2305*m*, Stats., requiring contracts agreeing to pay a commission for the buying or selling of real estate to be in writing, does not apply to a contract made in Illinois and relating to lands in that state. *Dean v. Wendeberg,* 513

Construction of contract: Authority of broker.

5. The words "to sell" and "to sell or find a buyer" in a real-estate brokerage contract are synonymous terms. *Grinde v. Chipman,* 376
6. The authority conferred upon a broker by an agreement which employs him "to sell" does not authorize him either to execute a conveyance of the premises or to enter into an agreement to convey. *Brown v. Griswold,* 109 Wis. 275, distinguished. *Ibid.*

Performance by broker: When compensation is earned.

7. A broker who is employed to procure a purchaser for real estate performs his contract and is entitled to his compensation when he produces a person ready, willing, and able to purchase upon the terms specified by the owner in the brokerage contract. *Grinde v. Chipman,* 376
8. A real-estate agent is entitled to his commission if he has produced a person ready, willing, and able to buy on the terms authorized by the vendor. *Dean v. Wendeberg,* 513
9. In the absence of an agreement to the contrary, the commission is earned when the proposed purchaser is willing to enter into an agreement on the terms specified by the owner. While an enforceable agreement may be made providing that the commission shall not be paid until the transaction is completed, the owner cannot avoid paying a commission if by his fault, misconduct, or wrongful neglect he prevents the consummation of his contract with the buyer. *Ibid.*

Same: Refusal of owner to complete contract.

10. Where a contract between the vendors and a purchaser procured by a broker was valid and the refusal of the vendors to live up to its terms was without justification, the broker was entitled to his commission. *Dean v. Wendeberg,* 513
11. The fact that the purchaser was willing to cancel the contract with the owner is no proof that the contract was induced by fraud. *Ibid.*

BUILDING CONTRACTS. See CONTRACTS, 3. DAMAGES, 1. MECHANICS' LIENS. MUNICIPAL CORPORATIONS, 9–12.

BURDEN OF PROOF. See FRAUDS, STATUTE OF, 1. RAILROADS, 6. WILLS, 3, 6.

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Of insurance society. See INSURANCE, 4–8.

CANCELLATION of contract. See SALES, 9.

CARRIERS.

See RAILROADS. STREET RAILWAYS.

Illegal rates: Rights of consignee.

1. Where the initial carrier of a shipment of coal quoted the same rate charged by other carriers, but on arrival of the coal at its destination it was discovered that the carrier had never published such rate, and that the rate according to the tariff in force was larger, the consignee was under no obligation to accept the coal and pay the illegal rate and afterwards seek his remedy. *Waters v. Becker,* 621
2. The fact that a bill of lading covered a shipment of coal and gave the carrier the right to make a reasonable charge for storage of property not removed within forty-eight hours, gave it no right to hold the coal in the cars for six months after the consignee refused to accept it and charge storage therefor, where the refusal to accept was due to an excessive freight rate. *Ibid.*

Same: Damages for withholding shipment.

3. In determining the damages for the conversion of shipments of coal by the carrier, the freight charges, when unpaid, should be deducted from the fair market value of the coal at the point of destination, this fully compensating the shipper, who should not be permitted to profit because the contract was not performed. If the freight has been paid the amount should be included as part of the damages. *Waters v. Becker,* 621

Jurisdiction of interstate commerce commission: Of state courts.

4. The interstate commerce commission having jurisdiction over the tariff regulations and practices relating to reconsignments, the circuit court had no jurisdiction to determine a claim of the consignee for conversion when the validity of the claim was dependent upon whether or not a regulation of the carrier as to reconsignments was proper. *Waters v. Becker,* 621
5. The carrier's claims for demurrage charges accruing on coal accumulating at a certain point, as the result of a dispute over the validity of an order affecting the consignee's reconsignment rights, having been submitted to the interstate commerce commission, were not within the jurisdiction of the state circuit court. *Ibid.*
6. Under sec. 9 of the Interstate Commerce Act (4 Fed. Stats., Ann. (2d ed.) p. 432), where the consignee invoked the jurisdiction of the interstate commerce commission respecting the interpretation and validity of a carrier's tariffs relating to reconsignments, charges for demurrage, and reconsignment and reparation claims, and the commission passed on most of the questions but had never made any final order of reparation or determination of the amount to be paid, the consignee had elected his remedy and could not thereafter bring action in the circuit court to recover demurrage and reconsignment charges claimed to have been illegally collected. *Ibid.*
7. The consignee having submitted the question of damages for delay in delivery due to a dispute over his reconsignment rights to the interstate commerce commission, which held

that he had failed to use due diligence to avoid loss and could not properly be awarded damages for his loss, was, under secs. 8 and 16 of the Interstate Commerce Act (4 Fed. Stats. Ann. (2d ed.) pp. 430, 475), bound by his election in choosing the commission as the forum for relief, and could not bring action in the state circuit court to recover such damages. *Ibid.*

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See COURTS, 2, 5. JUDGES. STATUTES.

Presumption of validity of statute. See STATUTES.

1. The validity of a statute must be presumed until the violation of the constitution is shown beyond reasonable doubt, especially where to hold the statute unconstitutional would cast serious doubt on numerous other statutes. *State ex rel. Smith v. Outagamie Co.* 253

Power of legislature: Unwise legislation.

2. All legislative powers not withheld or limited by the constitution of the state or the exercise of which is not prohibited by the federal constitution are vested in the legislature, and courts cannot set aside statutes merely because they may be deemed unwise or may work inconvenience or hardship. *Pauly v. Keebler,* 428

Same: Delegation of legislative power.

3. The legislature cannot delegate its general power to legislate, conferred by the constitution, but it may authorize many things to be done by others which it might properly do itself if it were practicable. *State ex rel. Smith v. Outagamie Co.* 253

Equal protection of the laws: Reasonable classification.

4. The first article of the declaration of rights in the state constitution is a substantially equivalent limitation of legislative power to that imposed by the Fourteenth amendment to the federal constitution, and the legislature is bound to accord to all persons the equal protection of the laws and refrain from legislation depriving any one of life, liberty, or the pursuit of happiness. *Pauly v. Keebler,* 428
5. Within the constitutional provision requiring due process of law or its equivalent, the law of the land, a statute duly enacted by the legislature is not necessarily the law of the land if it is so arbitrary and capricious as to deprive the citizen of fundamental rights guaranteed by the constitution. *Ibid.*
6. Statutes do not in all cases deprive citizens of due process of law merely because they are limited to particular classes, since the legislature can make classifications to promote the general welfare if there exists such reasonable ground for the classifications as to show that they are not arbitrary and personal or do not unjustly discriminate between different classes of individuals. *Ibid.*
7. A statute which applies to all individuals similarly situated does not deny equal protection of the laws, though it is invalid if individuals or corporations are singled out for the imposition of burdens or as beneficiaries. *Ibid.*

Same: Legislation affecting mechanics' liens: Moneys paid by owner as trust fund. See MECHANICS' LIENS.

8. Sub. 3, sec. 3315, Stats., which makes it embezzlement for a principal contractor receiving money from a landowner to appropriate it for his own use without paying those persons entitled to a lien on the land, is constitutional, as it benefits every property owner irrespective of the value of his holdings, and under certain circumstances might be a protection to all laborers, subcontractors, and materialmen. The legislature may therefore constitute the moneys so received by the principal creditor a trust fund and punish its misappropriation as an embezzlement. *Pauly v. Keebler,* 428
9. Said sub. 3, sec. 3315, though it does not expressly prescribe that the prohibited act must be with fraudulent intent, implies a wrongful intent by the use of the term "embezzlement," and a conviction cannot be had thereunder without proof of an intent to defraud, the same as such proof must be made in a prosecution under sec. 4418. *Ibid.*
10. Said sub. 3, sec. 3315, does not violate sec. 16, art. I, Const., providing that no person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied. *Ibid.*

11. Sub. 3, sec. 3315, is not limited to cases where a claim of lien has been filed, but it does not apply where the right to a lien has been lost. *Ibid.*

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Contract for benefit of third person.

1. An agreement made between two persons for the benefit of a third, based upon a sufficient consideration, is enforceable by such third person. *Guardianship of Thienhaus,* 526

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2. A contract ambiguous on its face must be construed in the light of the surrounding facts and circumstances, the situation of the parties, and all of the material evidence in the case. *Felton v. Stacey,* 471

Same. See BROKERS, 5, 6. DRAINS. EVIDENCE, 3. INSURANCE, 3, 5, 11, 12. MORTGAGES. MUNICIPAL CORPORATIONS, 9, 10, 12. PARTNERSHIP, 1. SALES. SUBSCRIPTIONS, 2. VENDOR AND PURCHASER, 7.

Same: Implied covenants and warranties.

3. Even though there was no express representation by one taking a contract to erect a building as to his skill and competency as a carpenter, the law implies an undertaking on his part that he possesses the requisite skill to perform the work. *Burmeister v. Wolfgram,* 506

Cancellation of contract. See SALES, 9.

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Issue of stock: Consideration.

1. A corporation may not lawfully issue stock to an employee without consideration, no change being made in the contract of employment, and stock so issued is void. *L. J. Mueller Furnace Co. v. Holmes,* 518

Resignation of officer: Service of process.

2. The resignation of an officer of a private corporation terminates the office and a vacancy is at once created; and service of process on such resigned officer is not service on the corporation, notwithstanding a by-law providing that the directors of said corporation shall hold office until their successors are duly elected. *Western P. & M. Co. v. American M. S. Co.* 493

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Concurrent jurisdiction of state and federal courts. See CARRIERS, 4–7. FEDERAL EMPLOYERS' LIABILITY.

1. Whenever Congress gives a right which by its terms is not exclusively confined to the jurisdiction of the federal courts, such right may be enforced by a state court; and the jurisdiction of the state court is concurrent with that of the federal court. *Chicago, M. & St. P. R. Co. v. McGinley,* 565

General jurisdiction of circuit court.

2. Under sec. 8, art. VII, Const., and sec. 113.03, Stats., the circuit court is a court with general jurisdiction to hear all matters, civil and criminal, within this state, and no portion of its jurisdiction can be deemed to have been taken away from it excepting only by unmistakable legislative language to that effect. *State v. Fischer,* 69

3. Ch. 18, Laws 1909, creating the municipal court of Kenosha county, though it gives that court jurisdiction to summon a grand jury and proceed with indictments, does not deprive the circuit court for Kenosha county of such jurisdiction. *Ibid.*

Special municipal courts: Authorizing county boards to adopt statutes creating. See JUDGES.

4. Under sec. 2523—2, Stats., authorizing the county board of supervisors of any county to adopt the provisions of secs. 2523—1 to 2523—21, inclusive, and to provide for a special municipal court or courts as provided therein, and by resolution at any time thereafter to rescind its action and abolish the same, it was competent for a county board to adopt the

statute, determine the place or places where the judge should hold his office, and provide suitable quarters therefor; and its action in adopting the statute by resolution, and by a further resolution providing for a special municipal court to be held in certain named places in the county, was authorized. The statute was a valid enactment although operative only after a resolution adopting it. *State ex rel. Smith v. Outagamie Co.* 253

5. Said sec. 2523—2 does not, so far as it authorizes the county board to rescind its action, unconstitutionally delegate legislative power to the board, notwithstanding sec. 2, art. VII, Const., relative to the establishment of inferior courts, since the question of rescinding such action involves a question of fact whether the court is any longer necessary. *Ibid.*
6. A resolution declaring that the members of the county board were in favor of abolishing the court theretofore established, and directing that no county order be drawn or paid for any salary or other expense in connection with the court, sufficiently indicated an intention to rescind the former action of the board in adopting the statute. *Ibid.*
7. It was within the discretion of the county board to rescind its action in adopting the statute providing for special municipal courts, and it cannot be presumed that the members of the board acted in bad faith. *Ibid.*

Supreme court. See APPEAL.

Circuit courts. See PLEADING, 4.

County courts. See INSURANCE, 1. WILLS.

COVENANTS. See MORTGAGES, 16.

CRIMINAL LAW. See CONSTITUTIONAL LAW, 8, 9. COURTS, 3. PROHIBITION.

Specific offenses.

Embezzlement. See CONSTITUTIONAL LAW, 8–11.

Hunting without license. See GAME.

DAMAGES.

See CARRIERS, 3, 6, 7. ELECTRICITY, 2. EMINENT DOMAIN, 2–4. HIGHWAYS. SALES, 24–30.

Measure of damages on breach of building contract.

1. Where defects in work under a building contract cannot be presently remedied at a reasonable expense without any great sacrifice of work or material already wrought into the building, the proper measure of damages is the diminished value of the building as turned over to the owner as compared with its value if completed according to the contract. *Burmeister v. Wolfgram,* 506

Diminution: Personal injury: Compensation under vocational rehabilitation act.

2. Under the federal Vocational Rehabilitation Act (40 U. S. Stats. at Large, 617, ch. 107) no deduction should be made from the damages awarded by a jury for personal injury be-

cause of compensation received by the plaintiff during a portion of the time he was disabled. *Cunnien v. Superior Iron Works Co.* 172

Excessive damages. See NEW TRIAL, 1.

Interest as damages. See FRAUD, 16.

DEATH. See APPEAL, 1. EXPLOSIVES. INSURANCE, 10. MASTER AND SERVANT, 2.

DEBTOR AND CREDITOR. See APPEAL, 7. BROKERS. CARRIERS, 2, 5–7. CORPORATIONS, 1. DAMAGES, 1. DRAINS, 2, 3. ELECTRICITY. FRAUD, 16. FRAUDS, STATUTE OF. INSURANCE, 1, 2, 9–12. LIMITATION OF ACTIONS. LOGS AND LOGGING. MORTGAGES. NOVATION. PARTNERSHIP. PRINCIPAL AND AGENT. SALES. SUBSCRIPTIONS. TENANCY IN COMMON. VENDOR AND PURCHASER, 8–10.

DECEIT. See FRAUD.

DEDICATION. See HIGHWAYS, 2.

DEFECTIVE STREETS. See MUNICIPAL CORPORATIONS, 1–8.

DEFINITIONS. See WORDS AND PHRASES.

DELIVERY. See FRAUDS, STATUTE OF. SALES, 17.

DEMURRAGE. See CARRIERS, 5, 6. SALES, 20.

DEMURRER. See PLEADING, 2.

DEPOSITIONS.

See ADVERSE EXAMINATION. INJUNCTION, 3.

Sufficiency of address: Motion to suppress: When timely made.

1. The fact that depositions for use in a justice's court were addressed to the "Clerk of Justice Court, Rock County, care of" a firm of attorneys, instead of to the magistrate, is not a ground for suppression of the depositions for insufficiency of address, the papers having been delivered to the justice intact. *C. E. Erickson Co. v. Farnum,* 279

2. After a case has been called and a jury struck it is too late to move to suppress a deposition for insufficiency of address, under sec. 4091, Stats., requiring all objections to the admissibility of a deposition to be made before entering on the trial and providing that a deposition may be suppressed after the trial is begun for sufficient cause not disclosed in the deposition and accompanying papers, the defects in the address appearing on the face of the papers. *Ibid.*

DIRECTOR GENERAL OF RAILROADS. See RAILROADS, 1.

DIRECTORS. See CORPORATIONS, 2.

DISBARMENT. See ATTORNEY AND CLIENT.

DISCOVERY. See ADVERSE EXAMINATION.

DISCRETION.
Of county board. See COURTS, 7.
Of court. See APPEAL, 3, 5. DIVORCE, 3. INTERPLEADER. MORTGAGES, 12. NEW TRIAL. WILLS, 9.
DITCHES. See DRAINS.
DIVISION OF ESTATE. See DIVORCE, 3.

DIVORCE.

See INSURANCE, 3.

Cruel and inhuman treatment by wife: Evidence.

1. In an action by the wife for a divorce, the evidence is *held* to show that she had been guilty of a course of cruel and inhuman treatment of the husband practiced by means other than personal violence, through manifesting hatred toward him, through interference in his business, through placing her financial differences with her husband in the hands of an attorney, by employing various methods of coercion, if not blackmail, in attempting to secure a financial settlement, and by persistently worrying and harassing the husband. *Schoen v. Schoen,* 20
2. The evidence is also *held* insufficient to show that the husband had been guilty of such cruel and inhuman treatment as to entitle the wife to a divorce or such as to forfeit his own right to a divorce from her, although it appears that at times, because of the attitude of the wife, he lost control of his temper and behaved in a manner inconsistent with the relations of husband and wife, as on the whole he appears to have exercised self-restraint and to have been willing to do all that reasonably might have been expected of him to restore peaceful relations. *Ibid.*

Division of property.

3. Where the husband had secured an absolute decree because of cruel and inhuman treatment, the evidence is *held* to justify the application by the trial court of the rule that under ordinary circumstances one third of the property of the parties will be awarded to the wife. *Schoen v. Schoen,* 20

DOWER.

See INSURANCE, 1, 2.

Rights of widow before ascertainment of dower.

1. The widow and heirs of a decedent are tenants in common until assignment of dower, and prior to such assignment the widow has no vested freehold estate. *Estate of Johnson,* 248
2. Where the homestead of decedent was assigned to his daughter subject to the dower and homestead rights of the widow, who within a year remarried, a parol agreement between the daughter and the widow to the effect that the widow was to continue to occupy the premises rent free in consideration of

keeping them insured could not affect the nature of the interest which the widow had in the real estate at the time of her death, her dower interest being unassigned and unadmeasured. *Ibid.*

DRAINS.

See ESTOPPEL, 1.

Construction contract: Failure to comply with specifications: Waiver: Substantial performance.

1. That a drainage ditch could not be dug according to specifications by a floating dredge without proper conditions as to water, and that, without fault of the drainage commissioners, there was not at times sufficient water to float the dredge at the necessary height, does not excuse the contractors from compliance with their contract. *Schultz v. Three Lakes D. Dist.* 318
2. Although the contract provided that the commissioners might stop the work in case the contractors wilfully refused to comply with its terms, they might also insist on full performance; and payments on monthly estimates, accompanied by protests as to imperfection in the work, do not amount to a waiver of compliance with the specifications. *Ibid.*
3. Where the work done has accomplished the essential purpose sought, and the defects are susceptible of remedy so that an allowance out of the contract price will afford full indemnity to the district, the contractors have substantially performed the contract. *Ibid.*

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 5, 6.

EASEMENTS.

User unaccompanied by claim of right: Permissive use.

1. Where an easement of way is claimed because of the mere use by pedestrians for more than twenty years of a well-defined path across the plaintiffs' premises, the mere fact that the user continued for that period did not raise the presumption of adverse hostile user. *Wiesner v. Jaeger,* 281
2. A permissive user, no matter how long continued, cannot ripen into an easement by prescription. *Ibid.*
3. Where the evidence disclosed that for many years there existed a pathway extending from defendants' residence and summer cottages along a lake shore across plaintiffs' property to a general store and amusement grounds, and that defendants, their families, tenants, and guests, without the express consent of the plaintiffs or their predecessors but with their knowledge and acquiescence, were accustomed to use, without asserting a right to do so, the path on pleasure or business, it is *held* that the user of plaintiffs' premises was permissive and not adverse. *Ibid.*

EJECTMENT. See ESTOPPEL, 2.

ELECTION of remedies. See CARRIERS, 6, 7. SALES, 9, 10.

ELECTRICITY.

See PUBLIC UTILITIES.

Grant of right of way: Compensation to landowner.

1. A corporation engaged in the business of furnishing power was granted the right, by a good and sufficient conveyance, to construct its transmission line across plaintiffs' farm. It took possession of the right of way, built its line, ever since occupied the same by itself and its grantee, and it has not in any manner repudiated the grant. The plaintiffs received nothing for the grant, and the minds of the parties never met on the consideration therefor. *Held,* under such circumstances the law implies a promise on the part of the corporation to pay what the right granted is reasonably worth. *Krueger v. Topp-Stewart Tractor Co.* 264
2. In such case the court will take judicial notice that rights of this kind are not generally the subject of barter and sale so that they have a market value, it being necessary, therefore, to determine the value by evidence other than that of market value, and such evidence should include the same elements of damage as are involved in fixing compensation under condemnation proceedings. *Ibid.*

EMBARGO. See SALES, 17.

EMBEZZLEMENT. See CONSTITUTIONAL LAW, 8.

EMINENT DOMAIN.

Condemnation for telephone line: Measure of damages.

1. In condemnation proceedings for the purpose of acquiring a right of way for a telephone line in front of farm premises, accessibility to the line is a general public benefit and not a "special benefit" to the lands, in the sense in which that term is used in sec. 32.10, Stats. *Riddle v. Lodi Tel. Co.* 360
2. The measure of damages in such case was the difference between the value of the premises as they were without the telephone line and their value after the line was erected; and the accessibility of plaintiff's premises to the line should not be considered. *Ibid.*
3. Where premises are condemned for a right of way for a telephone line, the landowner may show the full use to which the condemned property may be put by the appropriator. *Ibid.*
4. The market value of property taken for a public use shall be ascertained as of the time of the taking, and where there has been no entry this time is ordinarily that of the award of damages: but where there has been a lawful entry, the damages shall be awarded as of that date, and no damages for trespass after entry can be allowed. *Ibid.*

EMPLOYERS' LIABILITY. See FEDERAL EMPLOYERS' LIABILITY. WORKMEN'S COMPENSATION.

EQUAL PROTECTION OF THE LAWS. See CONSTITUTIONAL LAW, 4–7.

EQUITY.

See FEDERAL EMPLOYERS' LIABILITY, 2, 3. INJUNCTION. MECHANICS' LIENS. MORTGAGES. VENDOR AND PURCHASER, 5, 6, 10.

Railroad removing spur track: Injunction against order of railroad commission to restore.

1. The act of a railroad company, believing in good faith that it had a right to do so, in peaceably tearing up one of its spur tracks in a hasty manner early in the day, though for the purpose of avoiding litigation, annoyance, or delay and of accommodating another shipper, will not preclude it from seeking the aid of a court of equity by application for a temporary injunction against the enforcement of an order of the railroad commission to replace the track. *Chicago & N. W. R. Co. v. Railroad Comm.* 534
2. One of the ancient maxims of equity is that he who "hath committed iniquity shall not have equity;" but this rule has never applied to a situation where a person in good faith, in a peaceable manner, under claim of right, and with no litigation pending has taken some action in reference to property he deemed his own. *Ibid.*
3. Where the cost of replacing the spur track was about $2,300, which would be wasted if it should be finally determined that the railroad company was acting within its rights, and where damages will adequately compensate the shipper who used the track, a temporary injunction against an order of the railroad commission requiring the restoration of the spur track should be granted. *Ibid.*

ERROR. See APPEAL AND ERROR.

ESTATES OF FREEHOLD. See DOWER, 1.

ESTOPPEL.

See INSURANCE, 7. MORTGAGES, 7. MUNICIPAL CORPORATIONS, 6.

Performance of unenforceable contract.

1. Where contractors engaged in excavating drainage ditches complied with an unenforceable oral agreement with the drainage commissioners to begin excavation at a certain point in the drainage district, they could not thereafter be heard to say that the oral agreement was not binding nor that they were damaged thereby, even though the commissioners insisted upon compliance therewith. *Schultz v. Three Lakes D. Dist.* 318

Failure to assert title to lands: Purchaser for value.

2. In ejectment by the daughters of defendants' predecessor in title, claiming as beneficiaries under the will of their mother, where plaintiffs, when they signed a lease of adjacent lands to their father's grantee, knew of the prior deed to the property in question to such grantee and that testatrix had been adjudged the owner in fee of such property, but did not re-

pudiate the deed nor assert title until commencement of the action, they were estopped to do so as against an innocent purchaser for value. *Hustis v. McWilliams,* 365

3. The evidence relative to the estoppel of plaintiffs to claim title is *held* to show that their father's grantee did not know, at the time of the conveyance to him, that testatrix had been adjudged the owner of the land, and that, in view of the grantee's knowledge of transactions regarding the property by plaintiffs' father and the relationship of the parties, he was not bound, as against plaintiffs, to search for a title they did not assert. *Ibid.*

EVIDENCE.

See ADVERSE EXAMINATION. NEW TRIAL, 2, 3.

Judicial notice: Municipal ordinances. See ELECTRICITY, 2.

1. A city ordinance is not properly pleaded where the portions of the ordinance recited in a complaint show that a section of such ordinance not set forth is necessary to be known to determine the acts forbidden; and the court cannot take judicial notice of the ordinance. *O'Brien v. Fred Kroner H. Co.* 238

Presumptions. See CONSTITUTIONAL LAW, 1. COURTS, 7. EASEMENTS. EVIDENCE, 2. HIGHWAYS, 2. STATUTES, 1. TRIAL, 5. WILLS, 2.

Same: Mental capacity of children.

2. Under the common law, in this respect still unchanged in Wisconsin, a child under the age of fourteen is entitled to the presumption that there is a want of sufficient understanding or mental capacity to form a criminal intent. In a criminal case this presumption must be overcome by evidence which satisfies beyond a reasonable doubt, but in a civil action a clear and satisfactory preponderance of the evidence suffices. *O'Brien v. Fred Kroner H. Co.* 238

Parol evidence: Unambiguous writings. See SALES, 5. SUBSCRIPTIONS, 2.

3. When parties reduce their agreements to writing, the measure of their obligation is, when plainly expressed, to be confined to what is there stated, and cannot be added to by parol. *Oconto Chamber of Commerce v. Grandall,* 447

Best or secondary evidence. See WILLS, 8.

Photographs as evidence. See TRIAL, 2.

Evidence in fraud cases. See FRAUD.

Weight and sufficiency. See APPEAL, 3, 6. DIVORCE. EASEMENTS, 3. ESTOPPEL, 3. FRAUD, 4–6. HIGHWAYS, 1. LOGS AND LOGGING. MECHANICS' LIENS. MORTGAGES, 9. NEW TRIAL, 2, 4. PHYSICIANS AND SURGEONS. SALES, 15, 18, 26. STREET RAILWAYS, 1, 2. TAXATION, 4. VENDOR AND PURCHASER, 5, 6. WILLS, 4.

Relevancy, materiality, and competency. See ADVERSE EXAMINATION. APPEAL, 1. DEPOSITIONS. ELECTRICITY, 2. EMINENT DOMAIN, 3. FRAUD, 9. LIBEL AND SLANDER, 5. WILLS. WORKMEN'S COMPENSATION, 2.

EXCEPTIONS. See TRIAL, 4.

EXCHANGE OF PROPERTY. See FRAUD, 9–15.

EXPLOSIVES.

Storing dynamite caps near place frequented by children. See EVIDENCE, 2.

A complaint by a widowed mother which is construed on appeal to allege that her thirteen-year-old boy, without felonious intent, took dynamite caps stored by the defendant outside of its building but on its premises and adjacent to a public alley in which, to defendant's knowledge, children were accustomed to play, and that the boy took the caps on a visit to a neighboring state, where as a result of an explosion while playing with the caps he was killed, states a cause of action. *O'Brien v. Fred Kroner H. Co.* 238

FACTORS. See BROKERS.

FALSE REPRESENTATIONS. See FRAUD.

FEDERAL CONTROL ACT. See RAILROADS, 1.

FEDERAL COURTS. See COURTS, 1.

FEDERAL EMPLOYERS' LIABILITY.

See COURTS, 1.

Jurisdiction of state and federal courts. See COURTS, 1. INJUNCTION.

1. Under the federal Employers' Liability Act of April 22, 1908, sec. 6, as amended by the act of April 5, 1910, sec. 1, the state courts have concurrent jurisdiction with the federal courts, such act merely recognizing the prior existing jurisdiction of the state courts. *Chicago, M. & St. P. R. Co. v. McGinley,* 565

Same: Control of bringing action: Injunction.

2. The federal act as amended does not prohibit a state court from regulating the conduct of its own citizens by injunction so as to prevent hardship, oppression, or fraud. *Chicago, M. & St. P. R. Co. v. McGinley,* 565

3. Equity may enjoin a citizen of this state from prosecuting an action for personal injuries against a railroad company under the federal act in the courts of another state where it is necessary to prevent hardship, oppression, or fraud. *Ibid.*

FEDERAL VOCATIONAL REHABILITATION ACT. See DAMAGES, 2.

FIDUCIARIES. See MORTGAGES. WILLS, 3.

FINDINGS.

Of court. See APPEAL, 2. TRIAL, 5.

Of industrial commission. See WORKMEN'S COMPENSATION, 2.

Of referee. See SALES, 18, 19.

FIREARMS. See GAME.
FIRE INSURANCE. See INSURANCE.
FIRES. See RAILROADS, 1.
FIXTURES. See SALES, 1.
FORECLOSURE.
Of land contract. See VENDOR AND PURCHASER, 8–10.
Of mechanic's lien. See MECHANICS' LIENS.
Of mortgage. See MORTGAGES.
Of trust deed. See MORTGAGES.
FRATERNAL INSURANCE. See INSURANCE, 4–8.

FRAUD.

See APPEAL, 7. ATTORNEY AND CLIENT. BROKERS, 9, 11. FEDERAL EMPLOYERS' LIABILITY, 2, 3. INJUNCTION. INSURANCE, 7.

Actionable representations: Future events.

1. Statements or representations as to future or contingent events, or as to expectations or probabilities, or as to what will be or is intended to be done in the future, do not constitute actionable fraud. *Jeleniewski v. Eck,* 497
2. A statement of an agent of a packing plant that it would prove profitable in the hands of the purchaser was an expression of mere opinion as to future success and could not form a basis of misrepresentation. *Farmers' Co-operative P. Co. v. Boyd,* 544

Same: Puffing of value.

3. Where the value of property is largely a matter of judgment, puffing of the value by the vendor does not make him legally liable where the purchaser has an opportunity to examine the subject of the sale. *Farmers' Co-operative P. Co. v. Boyd,* 544

Evidence sufficient to establish fraud.

4. In an action for damages sustained by reason of an alleged conspiracy on the part of the defendants in selling a packing plant to a co-operative association, the evidence is considered not to establish a cause of action. *Farmers' Co-operative P. Co. v. Boyd,* 544
5. In an action for damages because of false representations in the negotiations prior to an exchange of lands, it is *held* that the findings of the jury that the defendant falsely pointed out the lands which plaintiff was to receive, and falsely represented that the lands extended to a highway, and that the difference in value between the lands pointed out to plaintiff and those conveyed to him was $1,255, are sustained by the evidence. *Domaiki v. Liberty L. & I. Co.* 588
6. In an action for the buyer's failure to perform a contract for the sale of an engine and boiler, in which the buyer counterclaimed for false representations by the seller, and all issues as to false representations were found by the jury in the seller's favor except as to representations concerning the condition of the front of the boiler, which was not submitted

to them, it is *held* that the evidence as to this alleged misrepresentation is insufficient to make a jury question. *Carl Hartman Co. v. Friday,* 231

Reliance by purchaser: Duty to investigate.

7. Where the question of value becomes a subject of discussion between buyer and seller, the buyer is under a duty to investigate where it can be conveniently done. *Farmers' Co-operative P. Co. v. Boyd,* 544

8. Where plaintiff was engaged in the business of buying a packing plant, it must exercise the ordinary and reasonable diligence of a buyer and had no right to rely upon representations of value made by interested parties. *Ibid.*

9. In an action for false representations inducing an exchange of plaintiff's farm for defendant's plat of ground and dwelling house, evidence as to the value of plaintiff's farm was admissible on the question as to whether plaintiff relied on the representations. *Ohrmundt v. Spiegelhoff,* 214

10. Where defendant, in inducing the exchange, told plaintiff there were four and one-half acres in the plat and that the second fence from a certain point, and not the first fence, was the boundary of the property, whereas the tract contained about two and one-half acres and the first fence was the boundary, the representations were such as to authorize the plaintiff to rely thereon. *Ibid.*

11. There having been no opportunity for adequate examination by plaintiff as to the quality of the soil, he having visited the premises only once before the trade was made, on an occasion when there was snow, ice and water on the ground, he might rely on the representations of the owner as to the quality of the soil. *Ibid.*

12. An instruction that "as to material misrepresentations relied on by the purchaser, he having no knowledge or means of knowledge on the subject, the question whether, in the exercise of ordinary care and prudence as an intelligent man, he ought or ought not to have relied thereon, is immaterial." was not subject to exception when taken in connection with the preceding charge that, if false representations were made as to the value of the property and its quality as to productiveness, plaintiff could not recover damages for such misrepresentations, if in the exercise of ordinary care and prudence he ought not to have relied thereon. *Ibid.*

13. Where material false representations have been established the question is, Was plaintiff actually misled by them? and not, Would an ordinarily careful and prudent man be misled by them? *Ibid.*

14. If false representations were made and relied on by plaintiff, to his injury, it is immaterial that the person making the same in good faith believed them to be true. *Ibid.*

Recoverable damages: Interest on money paid.

15. The measure of damages for false representations as to the quantity and quality of land exchanged is the difference be-

tween the value of the property as it actually was at the time of the exchange and as it would have been had it been as represented. *Ohrmundt v. Spiegelhoff,* . 214

16. Where a plaintiff paid $1,255 in excess of the amount defendant was entitled to, the plaintiff was wrongfully deprived of its use, and was therefore entitled to recover interest from the date of the transaction. *Domaiki v. Liberty L. & I. Co.* 588

FRAUDS, STATUTE OF.

See SUBSCRIPTIONS, 1.

Goods shipped under oral agreement: Delivery.

1. Where plaintiffs claimed both an oral and a written contract with defendant containing substantially the same terms and that they had shipped goods pursuant to the oral contract, they had the burden of proving that the goods delivered to and accepted by defendant were delivered under the oral contract. *Libman v. Fox-Pioneer Scrap Iron Co.* 485

2. Delivery of goods alone is not sufficient to take an oral contract out of the statute of frauds, but it must be made under and pursuant to the contract. *Ibid.*

FREIGHT. See CARRIERS, 2, 3.

GAME.

Gun as public nuisance: Confiscation when not actually in unlawful use.

A gun is not a public nuisance under sec. 29.03, Stats., and cannot be seized by a conservation warden under sec. 29.05, unless at or about the time of the taking it is being used by the owner or possessor thereof in actual and unlawful hunting; and the gun of a person who, without a license, had started out on a trip to hunt wolves, but had abandoned the trip by reason of a breakdown of an automobile and was returning home through the game country, was not a nuisance although it was not knocked down and was lying on a blanket unloaded. *Hatton v. Fosnot,* 343

GAS COMPANIES. See PUBLIC UTILITIES, 1.

GENERAL DEMURRER. See PLEADING, 3.

GIFTS.

Occasional advances from father to son.

Advancements of occasional sums by a guardian to his ward (in this case father and son) were not intended as payments from the estate, but as gifts from father to son. *Guardianship of Thienhaus,* 526

GRADE CROSSINGS. See RAILROADS, 2–12.

GRAND JURIES. See COURTS, 3. PROHIBITION.

GRANT. See ELECTRICITY.

GUARDIAN. See GIFTS. INSURANCE, 3.

HIGHWAYS.

See AUTOMOBILES.

Laying out highway: Dedication: Damages.

1. Evidence showing, among other things, that a highway was laid out in 1862 four rods wide along a section line, but that the two rods west of the section line had never been used as a highway or damages awarded to the owners on that side, who had continued to use the land to such line, along which a fence had been maintained to the present time, and that the two rods on the east side had been continuously used as a road, is *held* to warrant a finding of the trial court that the highway did not legally extend beyond the west fence. *State ex rel. Jarman v. Root,* 188
2. To constitute a lawfully laid out highway there must be proof, or a presumption, that damages have been awarded, or a release obtained, or a dedication made. *Ibid.*

Law of the road. See AUTOMOBILES.

HOMESTEAD. See BROKERS, 3. DOWER, 2.

HUNTING. See GAME.

HUSBAND AND WIFE. See BROKERS, 3. DIVORCE. DOWER.

IMPLIED CONTRACTS. See ELECTRICITY, 1.

IMPRISONMENT FOR DEBT. See CONSTITUTIONAL LAW, 10.

INDEMNITY. See INSURANCE, 9–12.

INDICTMENTS. See COURTS, 3. PROHIBITION.

INDUSTRIAL COMMISSION. See WORKMEN'S COMPENSATION.

INFANTS. See EVIDENCE, 2. EXPLOSIVES. MASTER AND SERVANT, 2.

INFERIOR COURTS. See COURTS, 5.

INJUNCTION.

See EQUITY.

Injunction against bringing action in another state. See COURTS, 1. FEDERAL EMPLOYERS' LIABILITY, 2, 3.

1. The deprivation of the privilege of examining an adverse party before trial as provided by sec. 4096, Stats., does not work such hardship, oppression, or fraud as will warrant enjoining a citizen of this state from prosecuting an action under the federal act in Minnesota where there was no such privilege, both parties being on the same basis in this regard. *Chicago, M. & St. P. R. Co. v. McGinley,* 565
2. A citizen of Wisconsin will not be enjoined from prosecuting an action under the federal Employers' Liability Act in the courts of Minnesota because of the fact that in that state a verdict may be rendered by ten jurymen or because the jury will not have an opportunity to examine the premises. Under such act the injured employee may bring his action in a district wherein the railroad company is doing business. *Ibid.*

3. A court of equity is not warranted in enjoining a citizen of this state from prosecuting in a sister state an action for personal injuries sustained in Wisconsin on the ground that a large number of the witnesses reside in this state, making necessary the taking of their depositions instead of oral testimony. *Ibid.*

4. Nor will injunction lie because of allegations that his counsel in such other state has been guilty of unprofessional conduct, where such matter is denied generally and has not been established. *Ibid.*

INSTRUCTIONS TO JURY. See FRAUD, 12. SALES, 26.

INSURANCE.

See DOWER.

Fire insurance: Insurable interest of tenant in dower.

1. A tenant in dower has an insurable interest, and when her administrator collects the proceeds of a policy of insurance covering the premises he holds them for the proper owner; and while no claim need be filed against her estate, the county court has jurisdiction to determine the ownership of the fund in an action to charge the administrator as a trustee of funds in his possession. *Estate of Johnson,* 248

2. The tenant in dower having lost her life in a fire which destroyed the premises, she had no interest in them when the loss occurred, and the proceeds of the policy belong to the owner in fee. *Ibid.*

Life insurance: Beneficiary in tontine policy: Stipulation in divorce proceeding.

3. In an action to determine the ownership of deferred dividends accruing under a tontine life insurance policy, it appeared that in a divorce action between the insured and his wife, the beneficiary named in the policy, they stipulated that the insured should continue to pay the premiums on the policy for the benefit of their son so as to provide for him a good and suitable sum for his education and support, pursuant to which stipulation the divorce decree provided that the policy was to be continued until its maturity and at that time applied for the benefit of the infant son of the parties, followed by an indorsement on the policy by the secretary of the company that "the bonds provided for by policy . . . shall be delivered to the insured's son," and further, that the insured, who was appointed, and acted as, guardian of said son, filed an inventory of his ward's property, in which he stated, among other things, that the property of his ward consisted of the policy in question. *Held,* that the son acquired a right to the deferred dividends by virtue of the agreement entered into between the insured and the beneficiary in the divorce proceedings. *Guardianship of Thienhaus,* 526

Same: Fraternal insurance: By-laws designating possible beneficiaries.

4. Though both the Illinois statute under which a benefit society was incorporated and its charter authorized it to issue certificates in favor of blood relations of an insured, the society, by a by-law, could restrict those who might be designated as beneficiaries to certain blood relations and exclude cousins other than first cousins. *McGough v. Hogan,* 607
5. A valid by-law of a benefit society specifying those who might be designated as beneficiaries became a part of any contract of insurance evidenced by a certificate, whether so expressed or not. *Ibid.*
6. The right of one insured by a benefit society to change the beneficiary without the consent of the latter must be exercised in accordance with the by-laws of the society specifying those who may be designated as beneficiaries, and especially since sub. 5, sec. 1957, Stats., authorizes a change of beneficiary by complying with the by-laws of the society. *Ibid.*
7. Where a benefit society whose by-laws excluded cousins other than first cousins as permissible beneficiaries made inquiry as to the relationship of the insured and the proposed beneficiary before issuing a certificate upon a change of beneficiary, but was mistakenly or falsely informed that the person designated was a first cousin, and, when sued after the death of the insured, paid the money into court as authorized by its by-laws and alleged that it would not have issued the certificate had it known that the person designated as beneficiary was a second cousin, there was no waiver or estoppel. *Ibid.*
8. Under by-laws of a benefit society providing for a change of beneficiary by the surrender of the old and the issuing of a new certificate, and that the issuing of such new certificate should cancel any previous certificate, the surrender of the old certificate did not cancel it and render it void where the new certificate was invalid because designating a beneficiary not permitted by the by-laws; and the prior designation remained in full force and effect. *Ibid.*

Indemnity insurance: Personal liability: When insurer is liable.

9. A policy insuring against loss by reason of the liability imposed upon assured because of injuries sustained by a third person in an automobile collision, but also providing that no action shall lie against the insurer unless it be brought by the assured for loss actually sustained and paid by him in money, is a contract of indemnity. *Glatz v. General Acc., F. & L. Assur. Corp.* 42
10. Where an insurance company defended an action brought against an assured by reason of the death of a third person caused by the negligence of assured, and after judgment in the trial court dismissing plaintiff's action the assured was adjudicated a bankrupt, the insurance company was not liable for the amount of the judgment which was entered in plaintiff's favor on appeal to this court. *Ibid.*

11. An insurance company insuring against such loss may lawfully participate in the defense of actions against the assured, though the policy provides that no action shall lie against it unless it be brought by the assured for loss actually sustained and paid in money; and its contract assuming such obligation to defend an action is binding and enforceable between the parties. *Ibid.*

12. Under such a policy, the company's agreement to defend any action against the assured and pay the costs of the litigation, and its reservation of the right to settle claims or suits, is not an assumption by it of liability for any claim which may finally be established by judgment so as to waive the condition that no action can be maintained unless the assured has actually paid the loss. *Ibid.*

INTEREST. See FRAUD, 16.

INTERPLEADER.

See MORTGAGES, 12.

Discretionary matter: Appealable order.

The right to interplead a third person under secs. 2610 and 2656*a*, Stats., is discretionary with the court, but an order denying a motion to bring in a person who may be a proper but not a necessary party is not appealable. *Schroeder v. Arcade Theater Co.* 79

INTERSTATE COMMERCE COMMISSION. See CARRIERS, 4–7.

INTOXICATING LIQUORS. See LIBEL AND SLANDER, 1.

INVITEE. See AUTOMOBILES, 6, 7.

JOINT TENANCY. See TENANCY IN COMMON.

JUDGES.

See COURTS.

Judges of special courts: Abolishment of court: Salary of judges.

Sec. 26, art. IV, Const., providing that the compensation of public officers shall not be increased or diminished during their term of office, has no application to the action of a county board of supervisors in rescinding its previous action adopting the statute providing for special municipal courts, as the office of judge of such court is not a constitutional office, but one which may be created and abolished by the legislature at will. Said sec. 26 applies only to officers having a fixed salary from the state. *State ex rel. Smith v. Outagamie Co.* 253

JUDGMENT.

See APPEAL, 2. LANDLORD AND TENANT, 2.

Judgment entered without process: Vacation.

A judgment rendered in the absence of service of process on the defendant should be vacated, set aside, and expunged from the record; and a motion made for that purpose need not be

coupled with a showing that the defendant had a meritorious defense to the cause of action set forth in the complaint. *Western P. & M. Co. v. American M. S. Co.* 493

JUDICIAL NOTICE. See EVIDENCE, 1.

JURISDICTION.
Of courts. See COURTS.
Of industrial commission. See WORKMEN'S COMPENSATION.
Of interstate commerce commission. See CARRIERS, 4.
Of railroad commission. See PUBLIC UTILITIES.

JURY. See TRIAL, 1, 2.

JUSTICES' COURTS. See DEPOSITIONS, 1.

LAND CONTRACT. See VENDOR AND PURCHASER, 5–7.

LANDLORD AND TENANT.

See APPEAL, 7. MORTGAGES.

Notice to quit: Lease for definite period.

1. Where an unlawful detainer proceeding involving the question of whether a tenancy was from month to month or for the period of a year was settled by an agreement that the tenant should remain in possession until a specified date, the landlord was not required to give the tenant notice to quit on such date under sub. (3), sec. 3358, Stats., in order to maintain another action of unlawful detainer, since the tenancy terminated on such date by express agreement under sub. (1) of that section. *Mueller v. Derwae,* 580
2. A judgment in favor of the tenant in unlawful detainer proceedings, even though erroneous, where it is not appealed from, is *res judicata* in a subsequent action involving the same issue. *Ibid.*

LAW OF THE ROAD. See AUTOMOBILES.

LEASE. See LANDLORD AND TENANT. MORTGAGES, 6.

LEGACIES. See WILLS.

LEGISLATURE. See CONSTITUTIONAL LAW, 1–3.

LIBEL AND SLANDER.

Charging lawyer and legislator opposed to prohibition.

1. To charge plaintiff, a lawyer and member of the legislature, in a published article, with "sneering at prohibition enforcement in an outburst which asserts that to get drunk is human and keeping booze from a man is chaining him up," clearly means and implies not only that he is opposed to the enforcement of the Eighteenth amendment to the federal constitution and the Volstead act (41 U. S. Stats. at Large, 405, ch. 85), but that he entertains views contrary to good morals on the subject of intoxication, and is libelous, since as an assemblyman and as a lawyer plaintiff has taken oath to support the law and aid in its enforcement. *Hanson v. Temple,* 349

Conditional privilege: Malice.

2. Such an article is not privileged as offering fair criticism of plaintiff's acts as an assemblyman or as a citizen; and in order to constitute an alleged libelous article conditionally privileged, the publisher of the article must not be actuated by malice. *Hanson v. Temple,* 349

3. One may believe charges made by him to be true, be within the field of conditional privilege so far as purpose of communication and persons addressed are concerned, and yet be actuated by express malice. If express malice be found, it destroys the conditional privilege that would otherwise obtain. *Gerlach v. Gruett,* 354

Charging misconduct of pastor: Evidence.

4. In an action by a pastor for damages for libel consisting of charges of misconduct with a girl, the court did not err in striking out a portion of defendant's answer which alleged in substance that during the war the pastor refused to preach in the English language. *Gerlach v. Gruett,* 354

5. The court properly refused to receive evidence as to the duties of a Lutheran minister to his congregation to the effect that a stricter rule of morals was required than in ordinary life, because the conduct charged is adequately condemned by the prevailing code of morals as well as by the law. *Ibid.*

LICENSES. See GAME.

LIENS. See LOGS AND LOGGING. MECHANICS' LIENS.

LIFE INSURANCE. See INSURANCE.

LIFE TENANTS. See DOWER.

LIMITATION OF ACTIONS.

Payment on note by agreement with maker.

1. In an action by an indorsee of a promissory note against the maker, wherein it appeared that the maker had made no direct payment on the indebtedness within the statutory period of limitations, the evidence is *held* to support a finding by the jury that the defendant maker had agreed with the plaintiff indorsee that certain rents due to the indorser be applied on the note. *John Hoffmann & Sons Co. v. Parks,* 303

2. The liability of the maker and indorser upon the note and the mutual agreement of the parties would be ample consideration for the payments. *Ibid.*

3. Although the court required the jury to find whether an agreement was made "that the rent checks or some of them" be applied as payments on the note, and a question so framed in the alternative is not ordinarily approved, it is *held* that, since there was no evidence which would indicate that some of the checks were to be so applied and others not, the jury were not misled and no injustice was done. *Ibid.*

LOGS AND LOGGING.

Claim for logging work: Failure to assert lien.

1. Where defendant expressed a willingness to pay plaintiff's claim for logging work done for one of its contractors if plaintiff would furnish an itemized statement of the time he and his team were engaged on the work, and the plaintiff did not do this, there was not an unconditional promise of the defendant to pay the claim. *Hemenway v. Connor L. & L. Co.* 443
2. Since the evidence does not show any agreement on the part of plaintiff to refrain from asserting his lien against the logs, and after he had made final demand of the defendant six days still remained within which he might file his lien, it is *held* that plaintiff was not induced to forego his lien by reason of the negotiations with defendant. *Ibid.*

MALICE. See LIBEL AND SLANDER, 2, 3.

MALPRACTICE. See PHYSICIANS AND SURGEONS.

MARRIED WOMEN. See BROKERS, 3. DIVORCE. DOWER.

MARSHALING OF ASSETS. See MORTGAGES, 17.

MASTER AND SERVANT.

See FEDERAL EMPLOYERS' LIABILITY. WORKMEN'S COMPENSATION.

Termination of employment: Discharge.

1. Defendant, under contract for a fixed period as superintendent of plaintiff, a manufacturer of furnaces, stated to the general manager that he had conceived an idea as to a smokeless furnace and was requested from time to time to put the idea into concrete form. He finally declined on the ground that the requested service could not be brought to a successful termination within the remaining period of his employment, and when plaintiff refused to promise additional compensation for work to be done after such period defendant left plaintiff's service. *Held*, that if the conversation be considered as a discharge it was justified, and if it be deemed a reason or excuse for defendant ceasing to render service it was insufficient. *L. J. Mueller Furnace Co. v. Holmes.* 518

Employment of boy as chauffeur: Injury to boy: Liability.

2. The employment of a boy about twelve years old by a corporation to act as chauffeur for one of its adult employees using an automobile is not an "employment dangerous to life or limb" forbidden by sub. 2 (c) (23), sec. 1728*a*, Stats., so as to make the employer liable for his death from injuries sustained in a collision between the automobile and a railroad train. *Schmidt v. Wisconsin Sugar Co.* 613

MATERIALMEN. See CONSTITUTIONAL LAW, 8. MECHANICS' LIENS.

MAXIMS.
He that hath committed iniquity shall not have equity, 534, 540.
He who comes into equity must come with clean hands, 540.
Once a mortgage always a mortgage, 98.
Res judicata pro veritate accipitur, 581, 586, 635.

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS.

See CONSTITUTIONAL LAW, 8–11. DAMAGES, 1.

Foreclosure: Amount due plaintiff: Substantial performance.

1. In an action to foreclose a mechanic's lien, filed for work performed and materials furnished under a building contract, the evidence is *held* to support the findings of the trial court as to the aggregate time plaintiff and his employees were engaged in the work. *Burmeister v. Wolfgram,* 506
2. The evidence is also *held* to support the finding of the court that there was such a substantial performance of the contract as entitled plaintiff to recover, the defects being open to observation, and defendants expressing satisfaction from time to time, and so ought not in equity and good conscience to be permitted to assert claims for such defects. *Ibid.*

MISREPRESENTATIONS. See FRAUD.

MORTGAGES.

See TENANCY IN COMMON. VENDOR AND PURCHASER, 9.

Deeds of trust: Nature: Duties of trustee: Authority.

1. Trust deeds, although of comparatively recent origin, are to be encouraged because they offer an opportunity of investment to the public at large in remunerative and successful enterprises and because they have a tendency to bring about a mutuality of interest and better understanding among employers and employees generally. The salability of the bond issue depends upon the fixed and unshakable security of the trust deed, and therefore the general rule has been evolved that a fixed legal right under a mortgage cannot be impaired by any equity subsequently arising. *Schroeder v. Arcade Theater Co.* 79
2. A deed of trust is a security for money advanced under the bond issue, and in legal effect is nothing more than a mortgage, title to the property remaining in the mortgagor and the mortgage merely securing the debt. The right of a mortgagee who has secured peaceable possession of the mortgaged premises after condition broken to retain them until the debt is paid, is not based on any title in him, but upon his equitable right to be paid without being put to the costs of an action. *Ibid.*
3. The trustee of the deed of trust in some respects represents the bondholders, in other respects the mortgagor, and in still other

respects both bondholders and mortgagor; but the provisions of a mortgage are not personal to the mortgagee, but are for the benefit and security of the mortgage debt. *Ibid.*

4. The authority of the trustee to act for the bondholders is prescribed and limited by the terms of the trust deed; and an analysis of the provisions of the instrument here involved discloses that the contracting parties appreciated that the rights, powers, duties, and privileges of the trustee depend upon the trust instrument. *Ibid.*

5. Since by the trust deed the trustee is required and obligated to act in a dual capacity, it is incumbent on him, in the execution of his duties and powers, to use the utmost good faith towards all parties in interest. *Ibid.*

6. Where the owner of a ninety-nine-year lease on real property erected a substantial building, and upon the property thus improved placed a large bond issue maturing five years from its date, and subsequently made a fifteen-year lease with a theater company which expended considerable sums in alterations of the building, the fact that representatives of the theater company, before any default in the conditions of the trust deed, interviewed the trustee and discussed the terms of the proposed lease, and that the trustee approved both the lease and the proposed alterations, did not make the trust deed subject to the lease, as the trustee was not authorized, expressly or by necessary implication, by any of the provisions of the trust deed, to subject the trust deed to a subsequently-made lease. *Ibid.*

7. The real party in interest is not the trustee but the bondholders, and since they had no knowledge of the lease of the theater company or of the proposed changes, and the trustee having no authority to make a lease, the bondholders are not estopped from claiming the priority of the trust deed over the lease. *Ibid.*

8. The assignment of rents to the mortgagee, followed by notices of such assignment, served by both mortgagor and mortgagee on the theater company, and the payment of rents to the mortgagee thereafter, did not establish the relationship of landlord and tenant, as the law of attornment does not apply as between the tenant of a mortgagor and the mortgagee in those states where the legal title does not pass to the mortgagee. *Ibid.*

9. After entry by the mortgagee upon condition broken he may treat tenants under leases subsequent to his mortgage as trespassers, or he may recognize them as his tenants. In this case, where the mortgagee entered after condition broken, collected rents, and immediately commenced foreclosure, it is *held* that the mortgagee manifested his intention of not treating the tenant as a trespasser, but of treating him as a new tenant under a lease terminating upon the sale of the property in the foreclosure proceedings. *Ibid.*

10. A trustee foreclosing a trust deed cannot be considered a party as an individual unless he is impleaded in his individual capacity. *Ibid.*

11. Failure to use reasonable diligence, or an abuse of his discretionary powers, renders a trustee under a trust deed personally liable to the party injured for the damages done. *Ibid.*

12. Under secs. 2610 and 2656*a*, Stats., the court could have permitted the interpleading of the trustee as an individual, even after the trial of the issues had proceeded for a period of two weeks, so as to enable an accounting and a final adjudication of the issues presented by defendants, who claimed that the trustee had misappropriated funds. *Ibid.*

13. A trust deed which provided that in case a default in the payment of interest continued for six months after written demand for payment, or in case default should be made in the performance of any of the provisions of the trust deed or in the lease which was mortgaged under such trust deed it was lawful for the trustee, and upon request of a designated number of bondholders it was his duty, to enforce by foreclosure or otherwise the terms of the trust deed, and which provided further that in case of default by the mortgagor in the performance of the conditions of the lease, one of which was the obligation to pay taxes, the trustee might declare the whole debt due,—authorized the trustee without a meeting of the bondholders, upon failure of the mortgagor to pay taxes, to declare the principal due and to proceed to a foreclosure. *Ibid.*

14. Although the lease provided that any successor in interest of the lessee was entitled to six months, after written notice, to comply with any provision of the lease alleged to have been breached, the trust deed is construed to authorize the trustee to declare due and foreclose the whole issue upon default in payment of taxes. *Ibid.*

15. Where the evidence showed that the trustee had advanced moneys for the payment of interest and held the matured interest coupons as security for such advances, the trustee is subrogated for the payments so made to the interest of the bondholders under the coupons. *Ibid.*

16. If the trustee misapplied the proceeds of the bond issue by authorizing the mortgagor to expend the same for purposes other than as limited by the trust deed, the bondholders might, by appropriate pleading, have enforced an accounting as to such improper expenditure, but they might also rely on the security of the trust deed. The clause in the trust deed as to the expenditure of the proceeds of the issue is a personal covenant between mortgagor and bondholder, which in no manner inures to the benefit of the second-mortgage bondholders, and does not run with the land so as to enable the latter to take advantage of it. *Ibid.*

17. The doctrine of marshaling of assets and securities is recognized in this state and should be applied wherever available, if the same does not work hardship or inequity to the inter-

ests of the first-mortgage bondholders; but this doctrine is inapplicable where the paramount creditor is sought to be compelled to exhaust a mere personal remedy. *Ibid.*

Joint or several mortgages. See TENANCY IN COMMON.

Acceleration of maturity upon default. See VENDOR AND PURCHASER, 9.

MOTOR VEHICLES. See AUTOMOBILES.

MUNICIPAL CORPORATIONS.

See NEGLIGENCE, 1, 2. STREET RAILWAYS.

Claim for damages for injuries in defective street: Necessity of notice: Sufficiency.

1. A right of action against a municipal corporation for injuries from a defect in a city street being purely statutory, the conditions imposed thereby are precedent to a right of action, and failure to give the notice of the injury required by the statute is fatal. *Hogan v. Beloit,* 199
2. Where a complaint against a city set forth *in hæc verba* the notice which was given, allegations as to its nature and contents would be inadmissible, and any conclusion of law or construction placed upon the notice is not admitted by a demurrer. *Ibid.*
3. A notice to a city that plaintiff, on a stated date and on a designated street, caught her foot on an obstruction and fell, breaking her wrist, that a doctor had set it, and "will advise you later as to expense," signed by plaintiff's son, did not state "that satisfaction therefor is claimed of such city," as required by sec. 1339, Stats., and was insufficient. *Ibid.*
4. A notice which did not state the facts required by sec. 1339 could not be regarded as sufficient on the ground that such notice was given as would enable the city by investigation to discover all the facts. *Ibid.*
5. Failure of the notice to state that satisfaction for the injury was claimed from the city was not an inaccuracy as to time, place, insufficiency, or want of repairs to be disregarded under the proviso of sec. 1339 relating to notice. *Ibid.*
6. There was no waiver by or estoppel of the city as to the sufficiency of the notice because the claim was drawn by the city engineer at the instance of claimant's son, the act of the engineer not being in performance of any duty owing to the city. *Ibid.*
7. Such notice is not a pleading or proceeding in an action within sec. 2829, Stats., authorizing disregard of error therein not affecting substantial rights, the notice being a condition precedent to the action. *Ibid.*
8. A city in repairing a street acts in a governmental capacity, and there is no common-law liability for negligence, as in case of active independent negligence or trespass, which might dispense with the notice of claim for injuries from negligent conduct in making the repairs required by sec. 1339. *Ibid.*

Contracts: Removal of bridge by contractor: Construction.

9. A provision in a contract with a city for the removal of a bridge that "no charge made by the contractor for any delays or hindrances from any cause during the progress of the work or any portion thereof embraced in the contract will be allowed," is construed to cover delay occasioned by the city's failure to remove street-car tracks and gas mains before the work began. *Nelson v. Eau Claire,* 387

Same: "Extras:" Waiver of written order.

10. A municipal contractor was not entitled to charge for extras where he did not make claims therefor before the payment of the next succeeding estimate, where the contract provided that "No extra work will be paid for or allowed unless the same was done upon the written order of the engineer. . . . All claims for extra work must be made to the engineer in writing before the payment of the next succeeding estimate, . . . and failing to do this the contractor shall be considered as having abandoned his claim." *Nelson v. Eau Claire,* 387

11. An engineer who had only the powers of a superintending engineer, even if he could waive written orders for extras, could not waive seasonable claims therefor, as the city council, which was to pass on the claims, was entitled to the written notice provided in the contract. *First Savings & Trust Co. v. Milwaukee Co.* 158 Wis. 207, distinguished. *Ibid.*

Same: Bad faith or negligence of engineer.

12. Where the contract provided that the contractor should be subject to the orders of the engineer and to the construction given by him to the plans and specifications, the contractor is entitled to recover damages proximately sustained by reason of the bad faith or inexcusable ignorance of the engineer, where he relied in good faith upon his directions. *Nelson v. Eau Claire,* 387

Appeal from disallowance of claim: Bond: Jurisdiction of court. See PLEADING, 4.

13. A bond on appeal to the circuit court from the disallowance of a claim by the common council of the city of Eau Claire, conditioned "for the faithful prosecution of said appeal, and the payment of all costs as should be adjudged against this plaintiff by said circuit court," was defective. *Nelson v. Eau Claire,* 387

14. If a void bond was given on appeal to the circuit court from the disallowance of plaintiff's claim, such court obtained no jurisdiction, and a demurrer on that ground was well taken. *Ibid.*

Annexation of territory: Jurisdictional defects in passing ordinance.

15. An ordinance to annex certain territory to a city, adopted within thirty days after the introduction thereof, in violation of sec. 925—19, Stats. 1915, is absolutely void, though its validity is not questioned within the time limited by sec.

925—21, since the failure to so question cannot operate to validate a proceeding which is void and therefore without legal effect. *Roehrborn v. Ladysmith,* 394

16. Where such ordinance was introduced pursuant to petition under secs. 925—17 *et seq.,* Stats. 1915, the city council was required to act on the ordinance within a reasonable time; but an interval of nine months between the publication of the ordinance and its adoption is *held* not to be such an unreasonable delay as to make the action of the council void. *Ibid.*

17. A resolution of a city council "that the ordinance annexing the territory be adopted" sufficiently described the ordinance, where there was no other ordinance to which it could possibly have referred and where no one was misled by the failure to more specifically describe it. *Ibid.*

Municipal courts. See COURTS, 3.

NEGLIGENCE.

See APPEAL, 1. AUTOMOBILES. EXPLOSIVES. FEDERAL EMPLOYERS' LIABILITY. INJUNCTION. MUNICIPAL CORPORATIONS, 1–8. PHYSICIANS AND SURGEONS. RAILROADS. STREET RAILWAYS. WORKMEN'S COMPENSATION.

Attractive nuisances: Street car standing in street.

1. One may not maintain in a public street an implement, machine, or structure attractive to children without taking due care to prevent injury resulting to them by reason of natural childish interference therewith. *Kressine v. Janesville Traction Co.* 192

2. A street railway company which left a street car standing on its track in a public street is chargeable with knowledge that it is an alluring object to children, and is therefore required to render it innocuous to probable childish incursion. *Ibid.*

Same: Precautions against injury to children.

3. The employees of a railway company having tied the trolley pole to the top of a standing car, turned the switches at both ends of the car, set the brakes, removed the controller, and locked the doors, as a matter of law took proper precaution to prevent children from moving the car and thus injuring themselves. *Kressine v. Janesville Traction Co.* 192

4. The railway company was charged with knowledge of the ordinary conduct of children, and was bound to anticipate consequences arising from such conduct; but it was not bound to anticipate the extraordinary conduct or precocious ingenuity of a group of boys in crawling on top of the car, placing the trolley pole in contact with the wire, and then picking up an insulator, never used for the purpose, and making it serve as a controller to start the car. *Ibid.*

Violation of penal statute: Causation.

5. To recover on a claim of liability for injury consequent upon a violation of a penal statute there must be some causal connection between such violation and the particular injury. *Schmidt v. Wisconsin Sugar Co.* 613

6. Where such causal connection is clear from the facts stated and proved it is for the court, but when not clear it may be a question for the jury. *Ibid.*

7. Allegations in a complaint that there was a violation of sec. 1728*a*, Stats., and that injury to and the death of a minor was proximately caused by such violation, are conclusions rather than statements of essential facts. *Ibid.*

Contributory negligence: Question for jury. See APPEAL, 1. AUTOMOBILES, 5. RAILROADS. STREET RAILWAYS.

8. In an action against a shipbuilding company for the death of an employee of an electric company who was killed while riding in the cabin of a crane in the plant of the shipbuilding company while it was being moved to test hoisting mechanism on which deceased had made repairs with the aid of two other skilled workers who were engaged with him in making the test, *held*, on the evidence as to his experience and knowledge of the dangerous conditions, that the question of contributory negligence on the part of deceased in putting his head in a dangerous position was for the jury. *Lyes v. Superior Shipbuilding Co.* 150

9. The contention that deceased was subjected to a hidden danger in that the operator of the crane moved the cabin without giving notice, is *held* not well founded because the facts and circumstances warrant the inference by the jury that deceased knew the cabin must be moved and that he and the men in the cabin were there for that purpose. *Ibid.*

Same: More than slight want of ordinary care at railroad crossings. See RAILROADS, 10–12.

NEW TRIAL.

See APPEAL, 3–5.

Because of excessive damages.

1. The court in granting a new trial unless the plaintiff elected to accept a sum stated, which was less than the damages found by the jury, should have placed the amount as low as an impartial jury on the evidence would probably name; when the option is given the defendant, the sum should be as high as such a jury would probably find. *Gerlach v. Gruett,* 354

Because of newly-discovered evidence: Liberal construction.

2. On a motion by plaintiff in a personal injury action for a new trial on the ground of newly-discovered evidence, such evidence should be construed favorably to plaintiff in determining the question whether, if true, it shows actionable negligence on the part of the defendant. *Welch v. Morton Salt Co.* 415

3. In an action for injuries sustained by a five-year-old boy by coming in contact with an auger salt conveyer in defendant's plant, where plaintiff, after a motion for nonsuit had been granted, moved for a new trial on the ground of newly-dis-

covered evidence, it was not an abuse of discretion to grant a new trial where the new evidence might show liability on the part of defendant. *Ibid.*

Because of perverse verdict: Discretion of court.

4. If a verdict is wholly unwarranted by the evidence or is the result of passion or prejudice, a new trial may be granted in the discretion of the court; but if it is one that reasonable men might find, it is not the duty of the court to disturb the decision of fact, which the law has confided to juries. If there is any credible evidence to support a verdict it cannot be disturbed, and a judgment of the trial court sustaining it should not be set aside unless clearly wrong. *Shaver v. Davis,* 592

NINETY-NINE-YEAR LEASE. See MORTGAGES.

NONSUIT. See NEW TRIAL, 3.

NOTICE.
Of assignment. See MORTGAGES, 8.
Of exercise of option. See VENDOR AND PURCHASER, 8.
Of injury. See MUNICIPAL CORPORATIONS, 1–5.
Of loss. See SALES, 6.
Of repudiation of contract. See SALES, 12.
To terminate tenancy. See LANDLORD AND TENANT, 1.

NOVATION.

See PRINCIPAL AND AGENT, 1.

Consent to discharge debtor.

In order to constitute a novation the creditor must consent to the discharge of the original debtor and accept the promise of the new debtor. *Peters v. Kanzenbach,* 602

NUISANCES. See GAME.

OFFER. See VENDOR AND PURCHASER, 1, 2, 4.

OFFICERS. See CORPORATIONS. JUDGES.

ORDINANCES. See MUNICIPAL CORPORATIONS, 15–17. STREET RAILWAYS, 1.

PARENT AND CHILD. See GIFTS. INSURANCE, 3. VENDOR AND PURCHASER, 5, 6.

PARTIES. See MORTGAGES, 7. PRINCIPAL AND AGENT, 2.

PARTNERSHIP.

Operating under corporate name: Rights of creditors.

1. Persons doing business under a corporate name pursuant to a recorded trust agreement relieving them from liability, but without being incorporated, and not holding themselves out as doing business under such agreement, were individually liable as partners for the debts of the concern contracted while they were partners therein. *Hayes Motor Truck W. Co. v. Wolff,* 501

2. A receiver appointed to settle the affairs of a partnership upon the application of one of the partners does not represent creditors, and they may file their claims, receive a dividend, and later, in separate actions, have recourse to the assets of individual partners. *Ibid.*

PATIENT. See PHYSICIANS AND SURGEONS.

PAYMENT. See LIMITATION OF ACTIONS. SALES, 6. VENDOR AND PURCHASER, 3.

PERMISSIVE USER. See EASEMENTS.

PERSONAL INJURY. See APPEAL, 1. AUTOMOBILES. DAMAGES, 2. FEDERAL EMPLOYERS' LIABILITY. INJUNCTION. INSURANCE, 9–12. MUNICIPAL CORPORATIONS, 1–8. NEGLIGENCE. NEW TRIAL, 2, 3. RAILROADS. STREET RAILWAYS. WORKMEN'S COMPENSATION.

PERSONAL PROPERTY. See FRAUD, 6. FRAUDS, STATUTE OF. GAME. GIFTS. LOGS AND LOGGING. PRINCIPAL AND AGENT, 2. SALES. TAXATION.

PHOTOGRAPHS. See TRIAL, 2.

PHYSICIANS AND SURGEONS.

Malpractice: Failure to reduce fracture: Evidence.

In an action against a physician for malpractice, while setting a fracture of the left femur, in not bringing the broken surfaces of the bone together and maintaining them in apposition during the healing period, the evidence is *held* to sustain a finding of the jury that defendant failed to exercise that degree of skill and care ordinarily exercised by physicians in good standing in the locality of his residence, and that such failure was the proximate cause of plaintiff's condition. *Donnelly v. Packard,* 308

PLEADING.

See BROKERS, 2. MUNICIPAL CORPORATIONS.

Complaint: Separate causes of action. See NEGLIGENCE, 7.

1. Under sec. 2647, Stats., a second cause of action should state a cause of action separately. *Nelson v. Eau Claire,* 387

Demurrer: Effect.

2. Upon demurrer thereto, the allegations of a complaint must be taken as true. *Hanson v. Temple,* 349
3. Where a cause of action sets out numerous items for which recovery is sought, if any of them are well pleaded a general demurrer thereto should not be sustained. *Nelson v. Eau Claire,* 387
4. A demurrer to a cause of action reaches all defects appearing upon the face of the complaint, including allegations as to the kind of bond that was given upon an appeal to the circuit court from the disallowance of plaintiff's claim by the city

council; and such allegations cannot be aided by extrinsic facts, even though they appear in the record, under secs. 2649, 2836*a*, Stats. *Ibid.*

Amendment of pleading. See APPEAL, 7. SALES, 10.

Pleading city ordinance. See EVIDENCE, 1.

Striking out pleadings. See LIBEL AND SLANDER, 4.

POSSESSION. See SALES, 4. VENDOR AND PURCHASER, 5.

PRESCRIPTION. See EASEMENTS, 1, 2.

PRESUMPTIONS. See CONSTITUTIONAL LAW, 1. COURTS, 7. EASEMENTS. EVIDENCE, 2. HIGHWAYS, 2. STATUTES, 1. TRIAL, 5. WILLS, 2.

PRICE. See SALES.

PRINCIPAL AND AGENT.

See BROKERS. FRAUD, 2.

Authority of agent: To compromise debt.

1. A collection agent who was not authorized to execute a release of a debt which he was attempting to collect from his principal's debtor could not accept the debtor's note payable to himself and discharge the debt. The release, not being consented to by the principal, constituted no valid consideration for the note. *Peters v. Kanzenbach,* 602
2. Where a collection agent was given a claim to collect and without authority obtained a note in which it was payee and gave a release to the debtor, its action in this respect not being ratified by its principal, the creditor, it could not bring action on the note as trustee of an express trust under sec. 2607, Stats., without joining the creditor. To warrant the bringing of such an action the creditor must expressly or impliedly have consented thereto, and a situation must also appear whereby the judgment obtained would bind such creditor and release his claim against the debtor. *Ibid.*

PROBATE OF WILLS. See WILLS.

PROHIBITION.

Court proceeding without jurisdiction.

A writ of prohibition is the proper and the only remedy that would afford adequate relief where an indictment has been returned to a court which had no jurisdiction to summon a grand jury and proceed by indictment. *State v. Fischer,* 69

PROXIMATE CAUSE. See APPEAL, 1. NEGLIGENCE, 5–7. PHYSICIANS AND SURGEONS. RAILROADS, 7, 10. SALES, 28.

PUBLIC UTILITIES.

See CARRIERS. ELECTRICITY. RAILROADS. STREET RAILWAYS.

Jurisdiction of railroad commission: Of courts.

1. Secs. 1797—37*m* and 1797—12*a*, Stats. (the railroad commission law), relating to jurisdiction of the railroad commission

over questions of overcharges or inadequate service, do not deprive the courts of jurisdiction to hear an action or counterclaim based on the failure of a public utility to perform its contract duty, such as the failure of a gas and electric company to perform its contract to furnish a certain quantity of gas and electricity. The jurisdiction of the commission is confined to prescribing rates and regulations for the future, and it has no jurisdiction to redress wrongs or grievances arising from past conduct of the utility. *Waukesha Gas & E. Co. v. Waukesha Motor Co.* 420

[2. Whether railroads may remove spur tracks constructed at their expense without applying to the railroad commission, not decided.] *Chicago & N. W. R. Co. v. Railroad Comm.* 534

PURCHASER. See ESTOPPEL, 2, 3. VENDOR AND PURCHASER.

QUANTUM MERUIT. See BROKERS, 1, 2.

QUESTIONS FOR JURY. See AUTOMOBILES, 1, 3–5. FRAUD, 6. NEW TRIAL, 4. RAILROADS, 4, 7, 10. TRIAL, 6.

RAILROAD COMMISSION. See EQUITY, 1. PUBLIC UTILITIES.

RAILROADS.

See APPEAL, 1. CARRIERS. EQUITY. MASTER AND SERVANT, 2. PUBLIC UTILITIES.

Setting fires: Action against director general or railroad.

1. Since the decision of this court in *Franke v. C. & N. W. R. Co.* 170 Wis. 71, the supreme court of the United States has held that under sec. 10 of the Federal Control Act of March 21, 1918 (40 U. S. Stats. at Large, 451, ch. 25), and Order No. 50 of the director general of railroads, an action of this kind (negligently setting fire to plaintiff's property) may not be maintained against the corporation owning the railroad, but must be brought against the director general. *Beebe v. Minneapolis, St. P. & S. S. M. R. Co.* 234

Injuries to employees. See FEDERAL EMPLOYERS' LIABILITY.

Lien for freight: Enforcement. See CARRIERS, 1–3.

Demurrage. See CARRIERS, 5, 6. SALES, 20.

Accidents at grade crossings: "Stop, look, and listen."

2. Where the undisputed evidence showed that a switch engine making a flying switch across a street left a signalman to flag the crossing, who stopped the driver of an approaching taxicab, and after the engine had passed, notwithstanding the signals and shoutings of the signalman, the driver started his taxicab and was struck by the cars following, he was guilty of contributory negligence barring a recovery for his death. *Rowart v. Kewaunee, G. B. & W. R. Co.* 286

3. The driver having stopped eighty feet from the track while the engine passed, the duty rested upon him to look for cars after again starting up to cross the track, and it was also his duty to look ahead in the direction in which he was driving. *Ibid.*

4. In an action by the driver of a motor truck for injuries sustained in a collision with defendant's train at a railroad crossing, the question whether the train was moving in excess of twelve miles an hour as it approached and was within twenty rods of the crossing was for the jury. *Shaver v. Davis,* 592

5. One who drives a motor truck upon a railroad crossing without looking or listening and paying no attention to an approaching train is guilty of contributory negligence, in the absence of an explanation of such conduct. *Ibid.*

6. The burden of showing contributory negligence is ordinarily on the defendant. *Ibid.*

7. Where the jury might have believed that there was a causal relation between the speed of the train and the extent of the injury, and that if the train had been going at a lesser rate of speed the injury would have been less serious or might not have occurred, a finding that defendant's negligence was the proximate cause of the injury will be sustained. *Ibid.*

8. It is the duty of one approaching a railroad track to look and listen when approaching the zone of danger and at the last practicable or reasonable opportunity; and it was not sufficient for one driving an automobile about twelve miles an hour to look when from 600 to 700 feet from the track, as he was not then within or near the danger zone. *Bahlert v. Chicago, M. & St. P. R. Co.* 481

9. Where an automobile driver, traveling a road which intersected a railroad track at an angle of 120 degrees, was familiar with the crossing, had normal hearing and sight, and had an unobstructed view for the last 100 feet, he was guilty of more than a slight want of ordinary care in failing to look for trains until he was only twelve or fifteen feet from the track and unable to stop before reaching it. *Gordon v. Ill. Cent. R. Co.* 168 Wis. 244, distinguished. *Ibid.*

Same: Relaxation or abrogation of rule.

10. The look-and-listen rule is to be considered in connection with all the facts in the case, and must be relaxed where the requirements of sub. 6, sec. 1809, Stats., are not complied with; and where plaintiff was unfamiliar with the existence of the crossing, the track being without fences or cattle-guards and situated in the outskirts of a city, and there was testimony that it was obscured by snow, a finding that there was no contributory negligence will not be disturbed. *Shaver v. Davis,* 592

11. No bell having been rung by a passing engine, a slight want of ordinary care on plaintiff's part does not defeat recovery, and the strict rule of ordinary care is correspondingly relaxed; but such relaxation does not abrogate the duty to look and listen for trains. Failure to look and listen within the zone where the duty exists, without sufficient excuse, constitutes more than a slight want of ordinary care. *Bahlert v. Chicago, M. & St. P. R. Co.* 481

12. To abrogate the rule as to the duty to look and listen at railroad crossings, the excuse for diversion of attention must be substantial. *Ibid.*

Rates. See CARRIERS. PUBLIC UTILITIES, 1.

Control by interstate commerce commission. See CARRIERS.

REAL-ESTATE BROKERS. See BROKERS.

REAL PROPERTY. See BROKERS, 3, 4. DOWER. DRAINS. EASEMENTS. ELECTRICITY. EMINENT DOMAIN. EQUITY, 1, 2. ESTOPPEL. HIGHWAYS. INSURANCE, 1, 2. LANDLORD AND TENANT. MECHANICS' LIENS. MORTGAGES. PUBLIC UTILITIES, 2. TAXATION. VENDOR AND PURCHASER.

RECEIVERS. See PARTNERSHIP, 2.

RECONSIGNMENTS. See CARRIERS, 4–6.

RECORD. See ADVERSE EXAMINATION, 1. PLEADING, 4.

RELEASE. See HIGHWAYS, 2. PRINCIPAL AND AGENT.

REMANDING CAUSE. See APPEAL, 7. TRIAL, 6.

RENT. See LANDLORD AND TENANT. MORTGAGES.

REPRESENTATIONS. See FRAUD.

RES JUDICATA. See LANDLORD AND TENANT, 2.

RISK OF LOSS. See SALES, 3–6.

ROADS AND STREETS. See AUTOMOBILES. EMINENT DOMAIN. HIGHWAYS. MUNICIPAL CORPORATIONS, 1–8. NEGLIGENCE, 1, 2. STREET RAILWAYS. WORKMEN'S COMPENSATION, 1.

RULES OF COURT.
Supreme Court Rule 6 (Cases and briefs), 492.
Supreme Court Rule 10 (Cases and briefs), 276.

SALES.

See FRAUD. FRAUDS, STATUTE OF.

Construction of contract.

1. A contract, valid under the statute of frauds, for the sale of machinery so annexed to the freehold as to be a part thereof, and which provided that the buyer might remove the machinery within a designated time upon the payment of the balance of the purchase price, should be treated and construed as a contract relating to personal property. *Boscobel v. Muscoda Mfg. Co.* 62

2. A conclusion of law that the phrase "Terms two per cent. fifteen days from date of invoice" on the face of an invoice meant that if payment was not made within fifteen days the whole amount was due, is sustained as a finding of fact upon evidence showing that such was the construction placed upon the phrase by both parties, although among the printed conditions upon the back of the invoice, incorporated by reference into the contract, was one which provided that payment was due in sixty days. *Evan L. Reed Mfg. Co. v. B. Heinemann L. Co.* 330

When title passes: Risk of loss.

3. Under sec. 1684*t*—18, Stats., providing that the property in specific goods is transferred to the buyer at such time as the parties intend, and sec. 1684*t*—19, rule 1, providing that, unless a different intention appears, an unconditional contract to sell specific goods in a deliverable state passes the property to the buyer when the contract is made, though the time of payment or of delivery, or both, be postponed, a contract of sale of the equipment of a power plant for a sum payable part in cash and part before taking such equipment from a building in which it was situated, which was to be done before a specified date, passed title to the buyer, and the risk of loss was on him, under sec. 1684*t*—22. *Boscobel v. Muscoda Mfg. Co.* 62
4. While a sale by the terms of which the purchaser is to pay cash on delivery is in a sense conditional, the distinguishing feature of a conditional sale, as that term is used and understood, is a sale by which the title to the goods is to remain in the seller until the payment of the price but the possession and use of the goods are with the purchaser until there is a default in payment. *Ibid.*
5. The time when a transfer of title under a sale contract takes place depends on the intent of the parties, which may be determined by the written evidence, or, if the matter is left in doubt, by the statements of the parties, subject to the limitations on the reception of parol evidence, and by the surrounding circumstances. *Delaney v. Globe Shipbuilding Co.* 167
6. In view of sub. 1, sec. 1684*t*—19, Stats., title to a tug sold unconditionally while afloat in a harbor tied to the seller's dock, the tug being in a deliverable condition, passed immediately to the buyer, at whose risk it was when afterwards sunk, though the seller failed to notify the buyer of the fact that it had sunk prior to the time he had made full payment of the purchase price. *Ibid.*
7. A bill of sale describing defendant as owner and that he had bargained and sold, and "by these presents do bargain and sell," is regarded as merely formal evidence of the bargain which had taken place some time before. *Ibid.*
8. Under sub. 2, sec. 1684*t*—20, Stats., providing that if the property would have passed to the buyer on shipment except for the form of the bill of lading the seller's property in the goods shall be deemed to be only to secure the performance by the buyer of his obligation, the beneficial title to the goods does not pass on shipment where they did not conform to the contract of sale or were misdirected. *Libman v. Fox-Pioneer Scrap Iron Co.* 485

Repudiation by buyer: Election of remedies.

9. The effect of an expression by the buyer, prior to the time of performance of his contract, of an intention not to perform, is to give the seller an opportunity to then treat the contract as thereby canceled, or to elect to hold and consider the con-

tract still in force and insist upon performance, and thereafter seek the appropriate remedy for either, but there must be an election in some manner of one or the other alternative; and where the seller gives no recognition of the renunciation and ships the goods, he must be held to have thereby waived his right to treat such action by the buyer as an anticipatory breach. *Washburn-Crosby Co. v. Kubiak,* 291

10. Where plaintiff had two inconsistent courses of action, upon choosing one he lost the other; and having brought action to recover the purchase price of the goods shipped, he cannot amend and set up an anticipatory breach of the sales contract prior to the date of the shipment. *Ibid.*

11. Great fluctuations in prices which have occurred in the past few years, while they furnish a motive, do not warrant repudiation of contracts of sale of goods. *Hess Bros. v. Great Northern Pail Co.* 465

12. Where a carload of candy pails was ordered December 9, 1916, and defendant made repeated unconditional promises to perform, and did not notify plaintiff of any intention to repudiate until December 6, 1918, the latter date should be considered as the date of breach by defendant for the purpose of fixing damages. *Ibid.*

13. Mere requests by the seller for changes or modifications of the contract, or objections to its terms, will not constitute a renunciation or repudiation of the contract when unaccompanied by a statement that it will be repudiated unless the changes or modifications are made. *Ibid.*

14. A buyer at all times insisting on performance of a contract to deliver cannot claim damages for a breach as of an earlier date than the seller's unequivocal notice of repudiation, if, on account of fluctuating prices, such claim would be to the disadvantage of the seller. *Ibid.*

15. In this case it is *held* that time was not of the essence of the contract, both parties having treated its performance as likely to be delayed and neither party treating it as abrogated or repudiated until long after the time fixed for its expiration. *Ibid.*

16. The contract providing for a discount of two per cent. if payment was made within ten days on each shipment, the seller could not accept payment after such ten days with the two per cent. deducted without objection and later repudiate the contract on the ground that the taking of such discount breached the contract. *Ibid.*

Performance or breach by seller: Buyer's rights.

17. Where delivery of goods is prevented by acts of superior authority (in this case an embargo on shipments west of Chicago), nonperformance is excused during the period of the inhibition; but the contract is not dissolved unless the inhibition will probably continue for such a period of time as will frustrate the object of the contract. *Hess Bros. v. Great Northern Pail Co.* 465

18. In an action for breach of a contract to purchase scrap iron, evidence that the goods tendered for delivery contained many articles not covered by the contract, that some of the carloads shipped were misdirected, and that the drafts attached to bills of lading for other cars were for more than the contract price, is *held* to sustain the action of the trial court in setting aside the findings of the referee of tender under the contract. *Libman v. Fox-Pioneer Scrap Iron Co.* 485

19. Evidence that previous carloads of scrap iron containing boilers and sheet iron had been accepted, but only after the buyer had procured an adjustment for the goods not covered by the contract, does not sustain a finding by the referee that there was a custom for such goods to be included in shipments of scrap iron and to be paid for at the market price. *Ibid.*

20. Under sub. 3, sec. 1684*t*—44, Stats., providing that where the seller delivers the goods sold mixed with goods of a different description the buyer may accept those in accordance with the contract and reject the rest, or may reject the whole, the buyer of scrap iron could reject the whole of shipments containing boilers and sheet iron, or which were misdirected so as to impose demurrage charges, or for which drafts attached to the bill of lading were drawn for amounts exceeding the contract price. *Ibid.*

21. Under sec. 1684*t*—44, Stats., a purchaser of a carload lot of flour, feed, and 200 bushels of corn had the right to reject the entire shipment where it did not contain the corn. . *Washburn-Crosby Co. v. Kubiak,* 291

22. In an action against the seller of cattle for damages for failure to furnish certificates of their registration and transfer, where the jury found that defendant had agreed to furnish them, it was proper to instruct the jury that it was incumbent on the defendant to perform within a reasonable time. *Martin v. Armstrong,* 208

23. As respects the liability of the seller for breach of contract by failing to furnish the registration and transfer certificates within a reasonable time, the fact that the registering association required from thirty days to two years to issue such papers will not relieve the seller, where he took no active steps to secure the papers within a reasonable time. *Ibid.*

Same: Measure of damages.

24. Under sub. 3, sec. 1684*t*—67, Stats., the measure of damages for breach of a contract to deliver goods is the difference between the contract price and the market price at the time of breach. *Hess Bros. v. Great Northern Pail Co.* 465

25. Since the evidence showed that the pedigree and ownership of cattle is a material element in establishing market value, the measure of the buyer's damages upon failure of the seller to furnish registration papers would be the difference in market value with and without the proper registration and transfer papers. *Martin v. Armstrong,* 208

26. A requested instruction in such case as to the duty of plaintiff to minimize the damages by securing the registration and transfer papers himself is *held* not to be warranted by the evidence. *Ibid.*

Breach of warranty: Measure of damages.

27. In an action for damages for breach of warranty because the article sold was adulterated, the question submitted by the court to the jury, viz. "Did the defendant adulterate the potash which he sold to the plaintiffs?" *held* error, the question being whether the potash was in fact adulterated, not whether the defendant adulterated it. *Richmond v. Cretens,* 297

28. The measure of damages for breach of warranty is the loss directly and naturally resulting in the ordinary course of events from such breach. This is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty, in the absence of special circumstances showing proximate damage of a greater amount. *Ibid.*

29. Defendant, a sawmill operator, inquired of plaintiff the price of his sawmill, to which plaintiff replied that the machinery had been sold but might be repurchased, and that "the necessary belting is all here," and later quoted a price for the mill and machinery which was accepted. *Held,* that under sec. 1684*t*—12, Stats., providing that any affirmation of fact made by the seller tending to induce the purchase is an express warranty, the plaintiff is liable for a shortage in the belting. *Kimball-Clark Co. v. Crosby,* 337

30. Plaintiff's letter, after stating that the machinery which had been sold was all in good condition, described the power plant owned by it, referring to boilers, engines, and other equipment, and a subsequent telegram offered the mill and machinery at a designated price "the way it stands." *Held,* that the word "machinery" referred to that which plaintiff was to repurchase and did not include or cover the boilers, and defendant, a man of experience in the business, having examined them, plaintiff is not liable if the boilers were not in usable condition. *Ibid.*

SECONDARY EVIDENCE. See WILLS, 8.

SERVANT. See MASTER AND SERVANT.

SERVICE of process. See CORPORATIONS, 2. JUDGMENT.

SLANDER. See LIBEL AND SLANDER.

SPECIAL MUNICIPAL COURTS. See COURTS, 4–7. JUDGES.

SPECIAL VERDICT. See FRAUD, 13. LIMITATION OF ACTIONS, 3. TRIAL, 3–6.

SPECIFIC PERFORMANCE. See ADVERSE EXAMINATION, 2.

SPUR TRACKS. See EQUITY, 1. PUBLIC UTILITIES, 2.

STATES. See FEDERAL EMPLOYERS' LIABILITY, 2, 3. INJUNCTION.

STATUTE OF FRAUDS. See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

See NEGLIGENCE, 5–7.

Presumption against radical change of legislative policy.

1. The presumption in construing statutes is against any radical change of legislative policy, and it is presumed that there is no intention to depart from any established policy of the law or to innovate on fundamental principles. *Will of Johnson,* 1

Constitutionality. See CONSTITUTIONAL LAW. COURTS, 4, 5. JUDGES.

2. Statutes are to be upheld by the courts unless they are unconstitutional beyond any reasonable doubt. *Pauly v. Keebler,* 428

Construction. See BROKERS, 1, 3, 4. CARRIERS, 6, 7. CONSTITUTIONAL LAW, 8–11. COURTS, 2–5. DAMAGES, 2. GAME. MASTER AND SERVANT, 2. MORTGAGES, 12. MUNICIPAL CORPORATIONS, 3–5, 7, 8, 15, 16. PLEADING, 1. PRINCIPAL AND AGENT, 2. PUBLIC UTILITIES, 1. RAILROADS, 1, 10. SALES, 3, 6, 8, 20, 21, 24, 29. TAXATION, 1, 2. TENANCY IN COMMON. WILLS, 7, 9. WORKMEN'S COMPENSATION, 1.

STIPULATIONS. See INSURANCE, 3. TRIAL, 3.

STOCK AND STOCKHOLDERS. See CORPORATIONS.

STOP-LOOK-AND-LISTEN RULE. See RAILROADS, 2–12.

STREET RAILWAYS.

See NEGLIGENCE, 1–4.

Collision with automobile: Running at excessive speed.

1. In an action by a passenger in an automobile for injuries sustained in a collision with defendant's street car at a street intersection, where it appeared that the collision would not have occurred if the street car had been traveling within the maximum speed of ten miles per hour allowed by a city ordinance, the jury were justified in finding that defendant was guilty of negligence causing the injuries. *Lindquist v. Duluth St. R. Co.* 158
2. The evidence is also held to justify a verdict exonerating the driver of the automobile from negligence in proceeding to cross the railway tracks ahead of the street car, which was one hundred and twenty-two feet away when the automobile, traveling nine miles an hour, was forty-six feet from the point of collision, and the driver did not know the street car was approaching at a forbidden rate of speed. *Ibid.*
3. Where the driver of the automobile was not negligent in attempting to cross ahead of the street car, plaintiff, confronted with the same conditions, was not negligent in taking no active steps to prevent him from crossing. *Ibid.*

STREETS. See AUTOMOBILES. HIGHWAYS. ROADS AND STREETS. STREET RAILWAYS.

SUBCONTRACTORS. See CONSTITUTIONAL LAW, 8.
SUBROGATION. See MORTGAGES, 15.
SUBSCRIBING WITNESSES. See WILLS, 7–10.

SUBSCRIPTIONS.

Assignment of subscription list.

1. A committee of citizens, procuring subscriptions to purchase a factory building and site to give to a manufacturing company to induce its coming to the city, could, without formal writing, assign whatever interest the committee had in the subscriptions so as to authorize the assignee to sue for an unpaid subscription. *Oconto Chamber of Commerce v. Grandall,* 447

Parol evidence to show obligation of subscribers.

2. Under such a subscription agreement parol evidence was proper to show that the express obligation of the subscribers included the price actually paid for a certain building and site in the city, but was not admissible to show that, in addition, there was a sum of $5,000 expended in improving and changing such building after its purchase, as the contract was unambiguous and plainly did not include such remodeling or raising money therefor. *Oconto Chamber of Commerce v. Grandall,* 447

SUBSTANTIAL PERFORMANCE. See DRAINS, 3. MECHANICS' LIENS, 2.
SUPREME COURT. See APPEAL. ATTORNEYS.
SURGEONS. See PHYSICIANS AND SURGEONS.
TARIFF. See CARRIERS.

TAXATION.

What property taxable: Property owned by the United States.

1. Under sub. (1), sec. 1038, Stats., providing that property "owned exclusively by the United States" shall be exempt from taxation, vessels wholly or partially completed and materials used in their construction were not taxable where a ship-building company, engaged to build certain vessels for the United States Shipping Board Emergency Fleet Corporation under contracts which provided that title to the vessels at any stage in construction and of assembled materials should, in so far as the same were paid for, be in the United States, and where, also, advances made on the date of assessment exceeded the amounts wrought into the vessels. *State ex rel. Superior S. B. Co. v. Beckley,* 272

Assessment: Review of action by board of review: General undervaluation of property.

2. Under sec. 1052, Stats., requiring real property to be valued by the assessor at the full value which could ordinarily be obtained therefor at private sale, if in any reasonable view the evidence taken by the board of review furnishes a substantial basis for its conclusion as to the value of the land and there

is nothing to show that it acted arbitrarily or dishonestly, its decision will not be interfered with by the courts. *State ex rel. Walthers v. Jung,* 58

3. A taxpayer may not complain of a valuation which could ordinarily be obtained for his property at private sale unless there is such a general undervaluation as will result in an excessive tax to him; but such a situation is not shown by a comparison of the valuation placed on his property with less than two per cent. of the property in the district, unless it appears that improper considerations influenced the valuation of his property. *Ibid.*

4. Where the decision of a board of review is sustained by direct and positive evidence as to the value of certain lots, and the only impeaching testimony is that of a witness who compared the assessment of the lots with the assessments placed on less than two per cent. of the other tracts of land in the assessment district, the determination of the board will not be reversed on *certiorari.* *Ibid.*

TELEPHONES. See EMINENT DOMAIN.

TENANCY IN COMMON.

See DOWER, 1.

Joint mortgages: Intent of parties.

The statutes (secs. 2068 and 2069) leave open to inquiry in each case whether a real-estate mortgage, joint in form, was intended to create a joint tenancy or a tenancy in common between the mortgagees; and the facts and circumstances attendant upon the execution of the mortgage may be considered to ascertain the intent of the parties. *Williams v. Jones,* 380

TENANT. See INSURANCE, 1, 2. LANDLORD AND TENANT.

TESTAMENTARY CAPACITY. See WILLS, 2–5.

TIMBER. See VENDOR AND PURCHASER, 2, 3.

TITLE.

To land. See EASEMENTS. ELECTRICITY. EMINENT DOMAIN. ESTOPPEL. HIGHWAYS. INSURANCE, 1, 2. LANDLORD AND TENANT. MORTGAGES, 2, 7. VENDOR AND PURCHASER.

To personal property. See FRAUDS, STATUTE OF. GAME. GIFTS. PRINCIPAL AND AGENT, 2. SALES. TENANCY IN COMMON.

TORTS. See APPEAL, 1, 7. AUTOMOBILES. BROKERS, 9, 11. CARRIERS, 3. EMINENT DOMAIN, 4. ESTOPPEL, 2. EXPLOSIVES. FEDERAL EMPLOYERS' LIABILITY. FRAUD. INJUNCTION. LANDLORD AND TENANT. LIBEL AND SLANDER. MORTGAGES, 11, 16. NEGLIGENCE. RAILROADS.

TRESPASS. See EMINENT DOMAIN, 4. MORTGAGES, 9. MUNICIPAL CORPORATIONS, 8.

TRIAL.

See APPEAL. INJUNCTION. JUDGMENT. LIBEL AND SLANDER, 4.

Election of remedies. See CARRIERS, 6, 7. SALES, 9, 10.

Use of depositions. See ADVERSE EXAMINATION. DEPOSITIONS.

View by jury: Purpose.

1. A view of premises concerning which testimony is given, is had to enable the jury to understand and correctly weigh the evidence, and if it is conflicting the view may be used to aid them in determining whose evidence is the more credible; and where the evidence as to the value of the property was conflicting it was not error for the court to grant a view over objection. *Ohrmundt v. Spiegelhoff,* 214

Instructions to jury. See FRAUD, 12. SALES, 26.

Use of photographs.

2. It was the duty of the jury, in connection with all the other evidence, to consider photographs of the scene of an accident, but they are not controlling on appeal, since photographs may convey false impressions though honestly taken. *Shaver v. Davis,* 592

Special verdict: Stipulated issue. See INSURANCE, 3.

3. The parties to an action having entered into a stipulation on the trial that "there is only one question to be determined by the jury and that is whether potash sold by the defendant to the plaintiffs was in fact adulterated," *held* no request that a question to that effect be submitted to the jury was necessary, the stipulation being a sufficient request by both parties for submission of such question. *Richmond v. Cretens,* 297

Same: Exception to objectionable form. See FRAUD, 13. LIMITATION OF ACTIONS, 3.

4. Where a special verdict is objectionable in form, counsel must object and enter due exception to the refusal of the court to correct it. *John Hoffmann & Sons Co. v. Parks,* 303

Omitted questions: When and how determined.

5. Where the attention of the trial court was properly called to an issue tendered by the pleadings and such issue was not submitted to the jury, it can make no finding thereon either by virtue of sec. 2858*m*, Stats., or otherwise, and the judgment rendered cannot be sustained by a presumption that findings supporting it were made. *Farmers' C. P. Co. v. Boyd,* 544

6. Under such circumstances, where the facts are undisputed or it is clear that only one proper conclusion thereon can be reached by reasonable men, the appellate court will determine the issue; but where the evidence as to the issue is conflicting or susceptible of different conclusions, the case will be reversed, and remanded with directions to submit the issue to the jury. *Ibid.*

Trials in criminal cases. See EVIDENCE, 2.

New trial. See NEW TRIAL.

TRUST DEEDS. See MORTGAGES.

TRUST AND TRUSTEES. See CONSTITUTIONAL LAW, 8. INSURANCE, 1. MORTGAGES. PARTNERSHIP, 1. PRINCIPAL AND AGENT, 2.

UNDUE INFLUENCE. See WILLS, 4–6.

UNIFORM SALES ACT. See SALES.

UNITED STATES. See TAXATION, 1.

UNLAWFUL DETAINER. See LANDLORD AND TENANT.

UTILITIES. See PUBLIC UTILITIES.

VACATION OF JUDGMENT. See JUDGMENT.

VENDOR AND PURCHASER.

See FRAUD.

Formation of contract: Offer withdrawn.

1. If an acceptance of an offer to sell timber, mailed before the offer was withdrawn, was insufficient to make a valid contract, no valid contract could thereafter be made by accepting the offer. *Hess v. Holt Lumber Co.* 451
2. An offer to sell timber having been made by post, the acceptance might be made in the same way; and the acceptance of the offer was complete from the moment the letter of acceptance was mailed by the offeree. *Ibid.*
3. Where an offer to sell timber did not specify the time, place, or medium of payment nor the time within which the timber was to be removed, if the offer had been accepted without qualification payment should be made to the vendor at its place of business in cash; and the purchaser would have had a reasonable time within which to remove the timber. *Ibid.*
4. But if the offer was accepted with a demand for one year's time within which to remove the timber, and the length of time within which it might have been removed in the ordinary course of business was not shown, there was such a material variation from the terms of the offer as rendered the acceptance qualified and prevented a completed contract from being created by the mailing of the letter. *Ibid.*

Same: Intention to vest title: Conduct of parties. See ADVERSE EXAMINATION, 2.

5. The evidence in this case is *held* sufficient, in view of the relations shown to have existed between a father and his son, to support a finding that they signed a land contract covering the property in question, that its terms were substantially as testified to, and that it was intended to vest title in the son, though the latter did not take possession, demanded no accounting, and made no assertion of ownership during his father's life. *Lamberson v. Lamberson,* 398
6. Evidence as to the relationship between the parties, the understanding of members of the family that plaintiff was not physically fitted to manage a farm, that he was occupied in other pursuits with the approval and consent of his parents, that his father was able to supervise the management of the

farm and arranged to have it conducted by plaintiff's brothers or their sons, together with plaintiff's natural hesitancy, in such circumstances, to deal with his father on a strictly business basis, is *held* to justify the conclusion of the trial court that he did not abandon his rights under the contract, though he did not occupy and manage the farm. *Ibid.*

Construction of contract: Purported duplicate contracts not identical.

7. Duplicate contracts prepared by a vendor of land and revised by him to comply with the vendees' wishes, where ambiguous and where the two copies are not identical, will be construed most strongly against the person who prepared them. *Felton v. Stacey,* 471

Maturity of deferred payments: Acceleration by default.

8. Where by the contract certain initial payments were to be made in instalments, notice by the vendor of his election to exercise an option to foreclose on account of the failure to pay an instalment renders the unpaid instalments of the initial payment and the remainder of the purchase price due. *Felton v. Stacey,* 471

9. A vendor or mortgagee, on default in payment of an instalment of a debt, if the security so provides, may on notice declare the whole unpaid amount due. *Ibid.*

10. Where the purchaser defaulted in the payment of an instalment of the initial payment for land and was notified by the vendor of his election of the option to foreclose in accordance with the contract of sale, but that he would not foreclose if the instalment was paid within a short time and a substantial amount paid on the principal, failure to make such substantial payment on the principal, as required by the notice, entitled the vendor to foreclose. *Ibid.*

VENUE. See INJUNCTION, 2.

VERDICT. See NEW TRIAL.

VIEW. See TRIAL, 1.

WAIVER.
Of breach of contract. See SALES, 9.
Of claim. See MUNICIPAL CORPORATIONS, 11.
Of notice. See MUNICIPAL CORPORATIONS, 6.
Of provisions of contract. See DRAINS, 2.
Of requirements of insurance policy. See INSURANCE, 7, 12.
Of written order. See MUNICIPAL CORPORATIONS, 11.

WARRANTY. See SALES, 27–29.

WILLS.

When will takes effect.

1. A will is ambulatory during the life of its maker and is in effect reiterated as his testament at each moment of his life after its execution, and is governed by the law existing at the time when it takes effect, upon the testator's death. *Will of Johnson,* 1

Testamentary capacity: Epileptics: Undue influence.

2. While the fact that a testator was epileptic may be important in determining the question of testamentary capacity, neither insanity nor testamentary incapacity can be presumed from the fact that he had long suffered from epilepsy, where there is no proof that he had hallucinations or delusions in the intervals between attacks, and where the will was of such a character as to be easily understood. *Will of Derusseau,* 140
3. Evidence that testator lived in the home of the sole devisee for about a month just prior to the execution of his will, the devisee being sometimes present with others when the testator transacted financial affairs, did not show a fiduciary relationship so as to change the ordinary rule as to the burden of proof. *Ibid.*
4. So, also, evidence that testator lived in the home of the devisee for about five years under an agreement to devise his property to him in return for support and medical attention during his life, and that the devisee went with him to have the will drawn, but was not present when instructions for drawing it were given, would not be sufficient proof of undue influence, even if the devisee had first suggested that some arrangement be made to compensate him for the burden he was to assume. *Ibid.*
5. The fact that the devisee, after caring for testator in his home for about five years, took him to an insane asylum when it became impracticable for him to remain in devisee's household, even if it be a breach of contract, is not a ground for contesting the will. *Ibid.*
6. The burden of showing alleged undue influence of the executor and beneficiary upon a testatrix is on contestant, as is also the burden of establishing that testatrix was of insufficient mental capacity and that she had insane delusions regarding her daughter. *Will of Schacht,* 54

Execution: Subscribing witnesses: Who are competent.

7. Under sec. 2284, Stats. 1898, as amended by ch. 128, Laws 1905, providing that all gifts made in a will to a subscribing witness shall be wholly void unless there be two other competent witnesses to the same, two other competent *subscribing* witnesses are required, and not merely two other persons who can testify to facts showing the execution of the will in conformity with the statute, as the phrase "witness to a will" means one who has attested the will by subscribing his name thereto. *Will of Johnson,* 1
8. The testimony of the subscribing witnesses to a will constitutes primary evidence of its execution, and other or secondary evidence cannot be resorted to for that purpose until after a showing that the subscribing witnesses are dead, beyond the jurisdiction of the court, or are *non compos mentis.* *Ibid.*
9. The common law of this country is that all of the subscribing witnesses must be produced when a will is offered for pro-

bate, unless the impossibility of producing them is made to appear; and the only modification of this rule in this state is in sec. 3788, Stats., providing that if there is no objection to the probate of a purported will the court may, in its discretion, grant probate on the testimony of one subscribing witness only. *Ibid.*

10. A mere bystander is not a witness to a will, much less a competent witness; and his testimony could be introduced only upon a showing that the primary evidence could not be produced. *Ibid.*

Same: Publication.

11. Where the subscribing witnesses to a will testified that it was not read over to testatrix in their presence and that she did not say that the document was her will or request them to sign it, but that they were requested by the attorney who drew the will to witness it, the request being made in the presence and hearing of testatrix, both seeing her affix her signature and each signing the document in her presence, there was a sufficient compliance with the law. *Will of Schacht,* 54

WITNESSES. See ADVERSE EXAMINATION. INJUNCTION, 3.

WORDS AND PHRASES.

Competent witness. See pages 4, 8.

Employment dangerous to life or limb, in statute. See MASTER AND SERVANT, 2.

Owned exclusively by the United States, in statute. See TAXATION, 1.

Performing service growing out of and incidental to his employment, in statute. See WORKMEN'S COMPENSATION, 1.

Persons entitled to a lien, in statute. See page 439.

Special benefit, in statute. See EMINENT DOMAIN, 1.

To sell, in brokerage contract. See BROKERS, 5.

Witness to a will, in statute. See WILLS, 7.

WORKMEN'S COMPENSATION.

See FEDERAL EMPLOYERS' LIABILITY.

Performing service growing out of and incidental to employment: City salesmen.

1. A city salesman whose duties did not require him to go to his employer's place of business before commencing work, and who was injured by an automobile truck while on his way to make his first business call, was "performing service growing out of and incidental to his employment," within the meaning of sub. (2), sec. 2394—3, Stats. *Schroeder & Daly Co. v. Industrial Comm.* 169 Wis. 567, followed. *United States C. Co. v. Superior H. Co.* 162

2. The findings of the industrial commission in proceedings on the salesman's claim for compensation were admissible in an action by a casualty company which paid the compensation and succeeded to the rights of the salesman against the person who caused the injury, where the complaint alleged that

such a claim had been allowed and paid, and these allegations were put in issue by defendant's answer. The findings were not conclusive on the question of defendant's liability, but were *prima facie* proof of the facts stated in the complaint. *Ibid.*

WRIT.

Of *certiorari*. See TAXATION, 4.
Of error. See APPEAL.
Of prohibition. See PROHIBITION.

Ex Ed
2/12/23